



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 3433 06639777 3



7

New York
Statutes-Codes
Civil Procedure
1864-1864

XVIL





THE
CODE OF PROCEDURE

OF THE
STATE OF NEW YORK,

AS AMENDED TO 1864.

WITH THE
RULES OF COURT AND APPOINTMENTS OF TERMS,

AND
AN INDEX.

EDITED BY
JOHN TOWNSHEND,
EDITOR OF "VOORHIES' CODE," &c., &c.

NEW YORK:
JOHN S. VOORHIES, LAW BOOKSELLER AND PUBLISHER,
20 NASSAU STREET.
1864.

283140

Entered according to Act of Congress, in the year 1864, by
JOHN S. VOORHIES,
in the Clerk's Office of the District Court of the United States for the Southern
District of New York.

BAKER & GODWIN, PRINTERS,
PRINTING-HOUSE SQUARE,
CORNER NASSAU & SPRUCE STS., N. Y.

 Special attention given to the Printing of Law Books, Law Cases, &c.

CONTENTS.

	Page.
INTRODUCTION, ...	5
EXPLANATORY NOTE, ...	4
THE CODE OF PROCEDURE, ...	25
RULES OF COURT:	
COURT OF APPEALS, ...	199
COURT RULES, ...	205
SUPREME COURT, IN FIRST DISTRICT, ...	239
SUPERIOR COURT, NEW YORK, ...	242
NEW YORK COMMON PLEAS, ...	247
TERMS OF SUPREME COURT, ...	250
NEW YORK SUPERIOR, ...	261
NEW YORK COMMON PLEAS, ...	262
INDEX, ...	263

EXPLANATORY NOTE.

It will be observed that some of the sections are twice numbered—as thus, 138 [116]—while other sections are only once numbered; also that some sections are preceded with the words and figures, (Am'd 1849), or (Am'd 1849, 1851), &c., while others have no such prefix; and, further, that some sections have the words "*Existing suits*" prefixed, and others have not.

The reason for these prefixes, or the omission of them, is to give the reader, at a glance, the history of each section, as thus:

When a section is only once numbered, as § 227, it indicates that it is one of the sections added by 1842.

When a section is twice numbered, as § 348 [297], it indicates that the section is one of those which existed in the Code of 1848, and that in that Code it was numbered as within the brackets [].

When the words and figures (Am'd 1849), or as the case may be, are prefixed, they signify that the section was amended in the year or years which the figures indicate.

When the words "*Existing suits*" are prefixed to a section, they indicate that the section is one of those which the provisions of the supplementary act apply to suits pending on July 1, 1848.

INTRODUCTION.

THE copy of the Code of Procedure here presented, except the amendments of 1862, has been carefully compared with the Code reprinted by way of appendix to the Session Laws of 1851, and with the subsequent printed volumes of Session Laws. The amendments of 1862 are taken from a copy of the act making those amendments, certified by the Secretary of State. The profession may confidently rely on the following sheets containing a correct copy of "*The Code as it is.*"

The following brief review of the modifications which the Code has undergone, will probably be not altogether wanting in interest or utility :

The Statute known as the Code of Procedure was passed April 12, 1848 (Laws 1848, ch. 379), and, except ss. 22, 23, 24 and 25, went into operation July 1st, 1848. It contained 391 sections, and continued in operation in the form as passed until May 1, 1849. It has been and is known as "*The Code of 1848.*" It applied, with some few exceptions, only to actions commenced after 1st July, 1848; but by an act passed 12th April, 1848 (Laws of 1848, ch. 380), which, except section 2, took immediate effect, certain sections of the Code of Procedure were made applicable to actions at law and suits in equity then pending, and provision was made for the determination of suits then existing, and for holding courts in the

First Judicial District. This act was known as the Supplement to the Code, and as the "*Supplementary Act*."

Actions and suits which were pending on the 1st of July, 1848, have since been and still are known and designated as "*existing suits*."

An act was passed 11th April, 1849 (Laws of 1849, ch. 438), amending the Code of Procedure. This act took effect May 1, 1849 (4 How., 41). It amended a majority of the sections in the Code of 1848, added eighty-two new sections, and contained in all four hundred and seventy-three sections; and it re-enacted the provisions in Laws of 1849, ch. 124 and ch. 337, relating to the Superior Court of the City of New York. For a time this last act was known and designated as the "Amended Code," afterwards as "The Code of 1849," now as "The Code;" and in referring to any section of the Code by number, it is the section in the Code as amended and re-numbered in 1849 that is intended.

In the same year, 1849, the act known as the "*Supplementary Act*" was amended (Laws of 1849, ch. 439), and it made wholly or partially applicable to "*existing suits*" the following sections of the Code of Procedure, viz.: sections 72, 121, 169 to 176, both inclusive, 315, 388, 292 to 302, both inclusive, 323 to 331, both inclusive, 333 to 347, both inclusive, 351 to 371, both inclusive, 390 to 399, both inclusive, 402 to 415, both inclusive, 417 and 418.

The Supplementary Act, in the part relating to courts in the First Judicial District, was again amended by Laws of 1852, ch. 374.

In 1851 (Laws of 1851, ch. 2), section 49 of the Code was repealed, and section 47 amended; and in the same year (Laws of 1851, ch. 479) amendments were made to the following sections of the Code, viz.: 11, 13, 14, 16,

24, 30, 31, 53 (subd. 3, 9), 56, 57, 60, 61, 62, 64 (subd. 11), 68, 74, 99, 100, 101, 111, 113, 114, 116, 122, 126, 130, 131, 132, 134, 135, 136, 138, 139, 142 (subd. 2), 149, 152, 153, 156, 157, 158, 162, 172, 173, 174, 179 (subd. 3), 188, 193, 231, 244, 246 (subd. 2, 3), 252, 255, 258, 259, 263, 264, 265, 268, 269, 272, 273, 278, 281 (subd. 2), 282, 284, 287, 291, 292, 297, 298, 302, 306, 307 (subd. 6), 317, 339, 348, 349, 353, 354, 366, 371, 384, 385, 397, 399, 459, 460, 470. This last act, passed 10th July, 1851, took effect, except section 13, on 30th July, 1851, and its application to actions theretofore commenced and then pending was prescribed by section 459. This act also directed the Secretary of State, in publishing the laws of that session, to publish the Code of Procedure entire, as amended by that act, as an appendix to the volume of the Session Laws. In compliance with this direction, the Code of Procedure was printed entire as an appendix to the Session Laws of the year 1851, the sections amended in that year being in said appendix printed in italics.

In the same year, Title V. of Part I. of the Code (ss. 33 to 51) was amended (Laws 1851, ch. 2); and in the same year (Laws of 1851, ch. 21) the 30th section of the Code was in effect amended by conferring on county courts jurisdiction in relation to jail liberties.

In April, 1852 (Laws of 1852, ch. 392), amendments were made in the following sections of the Code, viz.: 11, 13, 30, 33, 64, 101, 116, 140, 149, 150, 153, 167, 168, 173, 244, 252, 253, 255, 264, 265, 268, 272, 274, 278, 281, 287, 307, 317, 348, 349, 353, 354, 359, 360, 367, 397, 401, 460, 470, and 471. These amendments took effect 6th May, 1852. In the same year (Laws of 1852, ch. 44), section 30 of the Code was again amended.

By an act passed 13th July, 1853 (Laws of 1853, ch. 529), and which took immediate effect, section 28 of the Code was made applicable to the Court of Common Pleas for the City and County of New York, and the Superior Court and Marine Court of said city, and these courts were to appoint officers necessary to attend said courts, whose salaries were to be paid by the Supervisors.

In the same year (Laws 1853, ch. 511), section 135 was in effect amended by a provision as to service of process on concealed defendants.

In 1854, section 157 of the Code was in effect amended by an enactment (Laws of 1854, ch. 75) that the verification of any pleading in any court of record may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading. In the same year (Laws of 1854, ch. 135), provision was made for hearing appeals in the Court of Appeals, from orders granting new trials in certain cases, in appeals perfected prior to the amendments of 1852 taking effect; and in the same year (Laws of 1854, ch. 270), provision was made for appeals in special proceedings, and sections 327, 329, 330 and 332 of the Code were made applicable to such appeals. Also by Laws of 1854, ch. 96, s. 26, all the provisions of the Code, except Title IV. of Part II. (ss. 123, 124, 125, 126), applicable to the Supreme Court, and not in conflict with said act of 1854, were made applicable to the Superior Court of the City of Buffalo.

In 1855 (Laws of 1855, ch. 44), section 153 of the Code was amended, and in the same year (Laws of 1855, ch. 202), all the provisions of the Code were made applicable to recognizances forfeited in any Court of General

Sessions of the Peace, or of Oyer and Terminer, in any of the counties of this State.

In 1857 (Laws of 1857, ch. 723), amendments were made to the following sections of the Code, viz.: 11, 114, 121, 132, 153, 227, 229, 241, 244 (subd. 5), 265, 272, 300, 307, 308, 309, 311, 315, 331, 333, 352, 354, 362, 369. In the same year (Laws 1857, ch. 353) was amended section 399 of the Code.

Laws of 1857, ch. 344, consolidating the laws relating to District Courts in New York City (and Laws of 1851, ch. 147, 196, 514; Laws of 1852, ch. 54, 324), in effect repealed section 66 of the Code.

Laws of 1857, ch. 295; Laws of 1858, ch. 617; Laws of 1852, ch. 389; Laws of 1849, ch. 144, abrogate section 65 of the Code.

In 1858 (Laws of 1858, ch. 306), amendments were made to the following sections of the Code, viz.: 13, 56, 57, 60, 61, 62, 132, 135 (subd. 3), 204, 244 (subd. 1, 4), 246 (subd. 1), 256, 284, 292, 307 (subd. 5, 6, 7), 309, 328, 331, 344, 354, 399, 401 (subd. 3, 4, 5), 460.

In 1859 (Laws 1859, ch. 428), amendments were made to the following sections of the Code, viz.: 13, 134 (subd. 1), 172, 237 (subd. 4), 256, 272, 292, 307 (subd. 1), 309, 348, 399, 401 (subd. 3), 412.

In 1860 (Laws 1860, ch. 131), amendment was made to section 53 of the Code, and in the same year (Laws of 1860, ch. 459), amendments were made to the following sections of the Code, viz.: 30 (subd. 13), 62, 64, 135, 153, 229, 256, 267, 268, 272, 344, 399.

In 1861 (Laws of 1861, ch. 158), amendment was made to section 53 of the Code. In the same year (Laws 1861, ch. 288), it was enacted that appeals might be brought by the people, or any State officer or board of State officers,

without security, and that such appeals, then pending or thereafter brought, should operate as a stay of proceedings on the judgment or order appealed from. Also in the same year (Laws of 1861, ch. 86), provision was made for the transfer of actions from the City Court of Brooklyn to the Supreme Court in certain cases. Also in the same year (Laws of 1861, ch. 8), provision was made for the attendance of petit jurors at county courts and courts of sessions.

In 1862 (Laws of 1862, ch. 460), amendments were made to the following sections of the Code, viz.: 11 (subd. 2), 13, 24, 53 (subd. 2), 111, 116, 121, 132, 183, 230, 240, 241, 244 (subd. 4), 273, 274, 286, 287, 293, 304 (subd. 3, 4), 307 (subd. 3, 5, 7), 308, 309, 311, 318, 335, 348, 349, 352, 360, 364, 366, 371, 399, 401, 471; and the same law which made these amendments also repealed 2 R. S., 173, s. 37, which required the Court of Chancery to dismiss suits concerning property, where the matter in dispute, exclusive of costs, did not exceed \$100.

In 1863 (Laws of 1863, ch. 392), amendments were made to the following sections of the Code, viz.: 13, 104, 116, 154, 166 (subd. 7), 179 (subd. 4), 256, 273, 292, 294, 298, 307, 328, 335, 352, 355, 364, 371, 395, 399, 471. By the same law, section 37, art. second, title second, chapter first, part third, of the Revised Statutes in relation to the jurisdiction of the Court of Chancery was repealed, and chapter 416 of the Laws of 1862 were amended by striking out the characters and figures "§ 28, § 29, § 30."

In 1864 (Laws of 1864, chapters 000 and 414), amendments were made to sections 307, 352 and 371. By ch. 219, section 3 of title 2 of ch. 5 of part 3 of the Rev. Stat., relating to proceedings to compel the determination

of claims to real property in certain cases, was amended and applied to the Code of Procedure.

In addition to the statutes above mentioned, the jurisdiction and practice of the courts of this State, in civil actions, are affected by, among others, the statutes referred to below :

Actions,

Against heirs-at-law for debts of ancestor, 1859, ch. 110.

By Attorney-General, 1850, ch. 128 ; 1858, ch. 37 ; 1861, ch. 288.

Against Mayor, &c., of New York, 1860, ch. 379.

“ joint-stock companies and associations, 1851, ch. 455.

Albany,

Mayor's Court of, 1848, ch. 24 ; 1851, ch. 483.

Courts of Sessions in, 1849, ch. 76 ; 1851, ch. 481.

Terms of Supreme Court in, 1849, ch. 82.

Brooklyn,

City Court of, 1849, ch. 125 ; 1861, ch. 86.

Buffalo,

Recorder's Court of, 1848, ch. 363 ; 1850, ch. 138.

Superior Court of, 1854, ch. 96 ; 1857, ch. 361.

Corporation,

Railroad, service of process on, 1854, ch. 282, s. 14.

Insurance and others, service of process on, 1855, ch. 279.

Municipal appeals by, 1859, ch. 262.

“ costs against, 1859, ch. 262.

Collection of debts against, 1860, ch. 403.

Of New York City, actions against, 1860, ch. 379.

Courts

Of Oyer and Terminer, additional powers to, 1854, ch. 73.

Of Session, New York City, 1851, ch. 441.

Of Session, out of New York City, 1851, ch. 444.

Of Common Pleas, New York City, 1852, ch. 44 ; 1854, ch. 198.

- Marine, New York City, 1853, ch. 617.
- Places for holding in New York City, 1861, ch. 42.
- District, in New York City, 1857, ch. 344; 1862, ch. 389, 484.
- Of Appeals, preferred causes in, 1860, ch. 167.
- Of Chancery, the late enrollment of decrees of, 1853, ch. 421.
- Non-resident attorneys, 1862, ch. 43.

County Courts,

- Jurisdiction of appeals in proceedings to recover possession of demised premises, 1849, ch. 193.
- Powers of, as to jail liberties, 1851, ch. 21.

Evidence

- Of records in public offices of foreign kingdoms, &c., 1858, ch. 308, s. 8.
- Of service of notices by affidavit, in certain cases, 1858, ch. 244.

Executors, assignees, receivers, and other trustees,

- Powers of, extended, 1858, ch. 314.

Exempt property,

- Accoutrements of militia men, 1855, ch. 536, s. 72.
- On judgment in favor of domestic servant, 1858, ch. 107.
- Spinning-wheel, weaving-loom, stoves, and sewing-machine, 1860, ch. 152.
- Homestead, 1850, ch. 260.

Fees

- Of sheriffs, 1850, ch. 225.
- Of county judges abolished, 1857, ch. 564.
- Of justices of the peace, 1860, ch. 493; 1861, ch. 11.

Injunctions

- Against State officers, 1851, ch. 488.

Jail liberties, 1851, ch. 21.

- Parties not entitled to, 1857, ch. 627.
- Erie county, 1861, ch. 61.
- Dutchess county, 1861, ch. 73.

Judgment,

Satisfaction of, 1860, ch. 6.

In ejectment, 1861, ch. 221.

Kings county,

Printing calendars in, 1859, ch. 212.

Recording notices of lis pendens in, 1859, ch. 212.

Memorial titles,

Concurrent resolution as to, 1848, p. 582.

Metropolitan police

Exempt from military and jury duty and arrest on civil process and service of subpoena in civil actions, while on duty, 1860, ch. 259, s. 34.

New York City,

District Courts in, 1857, ch. 344; 1862, ch. 389, 484; and see 1852, ch. 324.

Marine Court of, 1853, ch. 617.

Superior Court of, 1849, ch. 124, 337; 1851, ch. 2; 1852, ch. 44.

Common Pleas, 1852, ch. 44; 1854, ch. 196.

Places for holding courts in, 1861, ch. 42.

Opening streets in, 1854, ch. 122.

Notices

Published in Albany Evening Journal legalized, 1860, ch. 174.

Legal publication of, in Fulton and Hamilton counties, 1860, ch. 95, 297.

Onwego,

Recorder's Court in, 1848, ch. 374; 1849, ch. 134.

Process,

Return of, by mail, 1850, ch. 225.

Service of, on corporations, 1854, ch. 282, s. 14; 1855, ch. 279.

Real property,

Determination of adverse claims to, 1848, ch. 50; 1854, ch. 116; 1853, ch. 511; 1860, ch. 173; 1864, ch. 219.

Certificate of sale of, by sheriff, on execution, 1857, ch. 60.
 Partition of, 1852, ch. 277; 1853, ch. 238.

Rochester,

Mayor's Court of, abolished, 1849, ch. 303.
 Justices of the peace in, 1849, ch. 22.

Ships and Vessels,

Collection of damages against, 1859, ch. 79; 1860, ch. 208,
 469.

Special proceedings,

Appeals in, 1854, ch. 270.

Supreme Court,

Justices of, vested with powers of the late Vice-Chancellors,
 1849, ch. 30.

Terms of, in Albany, 1849, ch. 82.

Terms of, in third district, 1849, ch. 111.

Governor to appoint justices to hold terms of, 1850, ch. 1.

Provision for cases of justices incapacitated by interest to
 hear a cause, 1850, ch. 15.

Assignments to receiver by order of the late Supreme Court
 in equity, 1851, ch. 163.

In first district, 1852, ch. 374.

Jurisdiction of disputed wills, 1853, ch. 238.

May order sale of real estate of benevolent, charitable, sci-
 entific and missionary societies, and orphan asylums,
 1861, ch. 58.

Presiding justice of, 1848, ch. 170.

Troy,

Mayor's Court of, 1848, ch. 86; 1849, ch. 164.

The Code does not affect proceedings upon mandamus,
 prohibition, appeals from surrogates' courts, nor the fol-
 lowing statutory provisions (Code, ss. 471, 472):

Ch. V., Pt. 2, of the Revised Statutes.

TIT. 1. ART. 1. Of attachments against absconding, concealed and
 non-resident debtors.

2. Of attachments against debtors confined for crime.
3. Of voluntary assignments made pursuant to the application of an insolvent and his creditors.
4. Of proceedings by creditors to compel assignments by debtors imprisoned on execution in civil causes.
5. Of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment.
6. Of voluntary assignments by a debtor imprisoned on execution in civil causes. (Laws 1857, ch. 427.)
7. General provisions applicable to proceedings under the several preceding articles.
8. Of the powers, duties and obligations of trustees as assignees under this title.
9. Provisions respecting assignees under former insolvent laws.
10. Provisions of the "act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26th, 1831, other than those which relate to justices' courts. (6 How., 348.)
11. 2. Of the custody and disposition of the estates of idiots, lunatics, persons of unsound mind, and drunkards.

Ch. V., Pt. 3, of the Revised Statutes.

1. 6. Of trespass on land.
8. Proceedings to discover the death of persons upon whose lives any particular estate may depend.

Ch. VIII., Pt. 3, of the Revised Statutes.

1. 1. Of the bringing and maintaining suits by poor persons. (14 How., 16.)
3. Of suits by and against executors and administrators, and against heirs, devisees and legatees. (10 How., 217; Laws 1859, ch. 110, 261.)
4. Of proceedings by and against corporations and public bodies having certain corporate powers, and by and

- against officers representing them [and joint-stock companies]. (11 How., 186, 29; 10 *id.*, 1, 487.)
5. Of suits against sheriffs, surrogates and other officers, on their official bonds.
 6. Of actions for penalties and forfeitures, and provisions for the collection and remission of forfeited recognizances and fines imposed by courts. (5 Abb., 384; 8 How., 431.)
 7. Of proceedings for the admeasurement of dower.
 8. Of proceedings for the collection of demands against ships and vessels [and mechanic's liens]. (Laws 1859, ch. 79.)
 9. Of proceedings for the recovery of rent and of demised premises.
 10. Of summary proceedings to recover the possession of land in certain cases. (1 Selden, 383; Laws of 1857, ch. 684.)
 11. Of distraining cattle and other chattels doing damage, and of distraining in other cases.
 13. Of proceedings as for contempts, to enforce civil remedies and to protect the rights of parties in civil actions. (*The People v. Compton*, 1 Duer, 512; *Re Smethurst*, 3 Code Rep., 55; 2 Sand., 724.)
 14. Of arbitrations.
 15. Of the foreclosure of mortgages by advertisement. (Laws of 1857, ch. 308.)
 16. Of proceedings for draining of swamps, marshes and other low lands.
 17. General miscellaneous provisions concerning suits and proceedings in civil cases.
 18. Proceedings to change the names of parties.

Ch. IX. of Pt. 3 of the Revised Statutes.

- TIT. 1. Of the writs of habeas corpus and certiorari in certain cases.

Section 23 of Art. 2 of Title 5 of Ch. 6, Pt. III., of the Revised Statutes, exempting certain property from execution, nor Laws of 1842, ch. 157, extending such exemption.

THE
CODE OF PROCEDURE

OF THE
STATE OF NEW YORK,

AS AMENDED TO
APRIL, 1891.

[The figures within brackets, placed after the number of the section, show the number of the corresponding section in the Code of 1848.]

AN ACT

To amend the act entitled "An act to simplify and abridge the practice, pleadings, and proceedings of the courts of this State," passed April 12, 1848.

Passed April 11, 1849.

The act entitled "An act to simplify and abridge the practice, pleadings, and proceedings of the courts of this State," passed April 12, 1848, is hereby amended so as to read as follows:

AN ACT

To simplify and abridge the practice, pleadings, and proceedings of the courts of this State.

WHEREAS, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, that the

distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established; therefore,

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1. Division of remedies.

2. Definition of an action.
3. Definition of a special proceeding.
4. Division of actions into civil and criminal.
5. Definition of a criminal action.
6. Definition of a civil action.
7. Civil and criminal remedies not merged in each other.
8. Subjects embraced in this act.

§ 1. [1.] *Remedies.*

Remedies in the courts of justice are divided into,

1. Actions.
2. Special proceedings.

§ 2. [2.] (Am'd 1849.) *Action.*

An action is an ordinary proceeding in a court of justice, in which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 3. [3.] *Special proceeding.*

Every other remedy is a special proceeding.

§ 4. [4.] *Division of actions.*

Actions are of two kinds:

1. Civil.
2. Criminal.

§ 5. [5.] (Am'd 1849.) *Criminal action.*

A criminal action is prosecuted by the people of the State, against a person charged with a public offence, for the punishment thereof.

§ 6. [6.] *Civil action.*

Every other is a civil action.

§ 7. [7.] *Remedies not merged.*

Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

§ 8. [8.] (Am'd 1849.) *Division of act.*

This act is divided into two parts:

The first relates to the courts of justice, and their jurisdiction;

The second relates to civil actions commenced in the courts of this State after the first day of July, 1848, except when otherwise provided therein, and is distributed into fifteen titles. The first four [§§ 69 to 126, both inclusive] relate to actions in all the courts of the State; and the others, to actions in the supreme court, in the county courts, in the superior court of the city of New York, in the court of common pleas for the city and county of New York, in the mayors' courts of cities, and in the recorders' courts of cities, and to appeals to the court of appeals, to the supreme court, to the county courts, and to the superior court of the city of New York.

A remedy has been given to
"Every civil action"
of Justice

"Every civil action"
of Justice

with Supreme Court
County Court
City Court

Every other thing
excepting a civil action

Every civil action
of Justice

PART I.

OF THE COURTS OF JUSTICE AND THEIR JURISDICTION.

TITLE I. OF THE COURTS IN GENERAL.

II. OF THE COURT OF APPEALS.

III. OF THE SUPREME COURTS, CIRCUIT COURTS, AND COURTS OF OYER AND TERMINER.

IV. OF THE COUNTY COURTS.

V. OF THE SUPERIOR COURT AND COURT OF COMMON PLEAS IN THE CITY OF NEW YORK, AND THE MAYORS' AND RECORDERS' COURTS IN OTHER CITIES.

VI. OF THE COURTS OF JUSTICES OF THE PEACE.

VII. OF JUSTICES AND OTHER INFERIOR COURTS IN CITIES.

TITLE I.

Of the Courts in general.

SECTION 9. The several courts of this State.

10. Their jurisdiction generally.

§ 9. [9.] (Am'd 1849.) *The several courts.*

The following are the courts of justice of this State:

1. The court for trial of impeachments. *Senate & Cth of App*
2. The court of appeals. *+ elected - 6 from Supreme*
3. The supreme courts. *33 judges - 8 districts*
4. The circuit courts. *level - 1 Sup' Cth I.*
5. The courts of oyer and terminer. *Crim & 1 Sup' Cth I.*
6. The county courts.
7. The courts of sessions. *Circuit Sup' & 2nd*
8. The courts of special sessions. *Justice of Peace*
9. The surrogates' courts.
10. The courts of justices of the peace.
11. The superior court of the city of New York.
12. The court of common pleas for the city and county of New York. *corresponds to Co. Cth in other Co*
13. The mayors' courts of cities.
14. The recorders' courts of cities.

10 term -
with -

Equity
jury causes -

15. The marine court of the city of New York.
16. The justices' [district] courts in the city of New York.
17. The justices' courts of cities.
18. The police courts.

§ 10. [10.] *Their jurisdiction generally.*

These courts shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this act.

TITLE II.

The Court of Appeals.

- SECTION 11. Its jurisdiction.
12. Power of court.
 13. Terms. Preference of causes.
 14. Judgment, how given.
 15. Sheriffs to provide rooms, &c.
 16. Court, where held. Adjournment.

§ 11. [11.] (Am'd 1849, 1851, 1852, 1857, 1862.) *Jurisdiction.*

The court of appeals shall have exclusive jurisdiction to review upon appeal every actual determination hereafter made at a general term by the supreme court, or by the superior court of the city of New York, or the court of common pleas for the city and county of New York, or the superior court of the city of Buffalo, in the following cases, and no other :

1. In a judgment in an action commenced therein or brought there from another court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, and when such order grants or refuses a new trial; but no appeal to the court of appeals from an order granting a new trial shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal

from an order granting a new trial, if the court of appeals shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages, or other proceedings to render the judgment effectual, may be there had, in cases where such subsequent proceedings are requisite.

3. In a final order affecting a substantial right made in a special proceeding, or upon a summary application, in an action after judgment.* But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New York, or in an assistant justice's court of that city, or in a justice's court of any of the cities of this State, unless any such general term shall, by order duly entered, allow such appeal before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions discontinued before a justice of the peace, and prosecuted in another court, pursuant to sections sixty and sixty-eight of this code.

§ 12. [12.] *Power of the court.*

The court of appeals may reverse, affirm, or modify, the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the court below, to be enforced according to law.

§ 13. [13.] (Am'd 1851, 1852, 1858, 1859, 1862, 1863.) *Terms.*
—*Preference of causes.*

There shall be four terms of the court of appeals in each year, to be held at the capitol in the city of Albany, on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the last Tuesday of September, and continued for as long a period as the public interests may require. But the judges of said court may in their discretion appoint one of said terms in each year to be held in the city of New York. Additional terms shall be appointed and held at the same place by the court when the public interest requires it. The court may, by general rules, provide what causes shall have a preference on the calendar. On

a second and each subsequent appeal to the court of appeals, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal; and whenever in any action or proceeding in which the people of this State, or any State officer, or any board of State officers, is or are sole plaintiff or defendant, an appeal has been or shall be brought from any judgment or order for or against him or them, in any court, such appeal shall have a preference in the supreme court and in the court of appeals, and may be moved by either party out of the order on the calendar.

§ 14. [14.] (Am'd 1849, 1851.) *Judgment.—Rehearing.*

The concurrence of five judges is necessary to pronounce a judgment. If five do not concur, the case must be reheard.

. But no more than two rehearings shall be had; and if on the second rehearing five judges do not concur, the judgment shall be affirmed.

§ 15. *Sheriff to provide rooms.*

If, at a term of the court of appeals, proper and convenient rooms, both for the consultation of the judges and the holding of the court, with furniture, attendants, fuel, lights, and stationery suitable and sufficient for the transaction of its business, be not provided for it in the place where by law the court may be held, the court may order the sheriff of the county to make such provision, and the expense incurred by him in carrying the order into effect shall be a county charge.

§ 16. (Am'd 1851.) *Court, where held.—Adjournment.*

The court of appeals may be held in other buildings than those designated by law as places for holding courts, and at a different place, in the same city, from that at which it is appointed to be held. Any one or more of the judges may adjourn the court, with the like effect as if all were present.

TITLE III.

Of the Supreme Court, Circuit Courts, and Courts of Oyer and Terminer.

- SECTION 17. Existing statutory provisions as to terms, &c., repealed.
 18. General terms.
 19. Judgment, how given.
 20. Special terms, &c.
 21. Circuit and oyer and terminer together.
 22. Times and places of holding courts.
 23. Extraordinary terms, &c.
 24. Courts, where held, adjournment of terms.
 25. Publication of appointment.
 26. Inability of judge.
 27. Business out of court. Transfer of business.
 28. Rooms, &c., how furnished.

§ 17. [15.] (Am'd 1849.) *Terms.*

All statutes now in force providing for the designation of the times and places of holding the general and special terms of the supreme court, and the circuit courts, and courts of oyer and terminer, and of the judges who shall hold the same, are repealed from and after the 1st day of July, 1848; and the order of the supreme court, adopted July 14, 1847, prescribing the times and places of holding the general and special terms of the court, and the circuit courts, and courts of oyer and terminer, during the residue of the year 1847, and for the years 1848 and 1849, and assigning the business and duties thereof to the several judges of the court, is, from and after the first day of July, 1848, abrogated, and the provisions of this title are substituted in place thereof.

§ 18. [16.] (Am'd 1849.) *General terms.*

At least four general terms of the supreme court shall be held annually in each judicial district, and as many more as the judges in such district shall appoint, at such times and places as a majority of the judges of such district shall appoint.

§ 19. [17.] *Judgment, how given.*

The concurrence of a majority of the judges holding a general term shall be necessary to pronounce a judgment. If a majority do not concur, the case shall be reheard.

§ 20. [18.] (Am'd 1849.) *Special terms, &c.*

There shall be at least two terms of the circuit court and court of oyer and terminer held annually in each of the counties of this State, and as many more terms thereof, and as many special terms, as the judges of each judicial district shall appoint therein; but at least one special term shall be held annually in each of said counties. Fulton and Hamilton shall be considered one county for the purposes of this section.

§ 21. [19.] (Am'd 1849.) *Circuit and oyer and terminer together.*

Circuit courts and courts of oyer and terminer shall be held at the same places, and commenced on the same day.

§ 22. [23.] (Am'd 1849.) *Times and places of holding court.*

The governor shall, on or before the first day of May, 1848, by appointment in writing, designate the times and places of holding the general and special terms, circuit courts and courts of oyer and terminer, and the judges by whom they shall be held; which appointment shall take effect on the first day of July thereafter, and shall continue until the thirty-first day of December, 1849. The judges of the supreme court of each district shall, in like manner, at least one month before the expiration of that time, appoint the times and places of holding those courts for two years, commencing on the first day of January, 1850, and so on, for every two succeeding years, in their respective districts.

§ 23. [24.] *Extraordinary terms, &c.*

The governor may also appoint extraordinary general and special terms, circuit courts, and courts of oyer and terminer, whenever, in his judgment, the public good shall require it.

§ 24. [25.] (Am'd 1849, 1851, 1862.) *Terms, where held.—Adjournments.*

The places appointed within the several counties for holding the general and special terms, circuit courts, and courts of oyer and terminer, shall be those designated by statute for holding county or circuit courts. If a room for holding the court in such place shall not be provided by the supervisors, it may be held in

any room provided for that purpose by the sheriff, as prescribed by section twenty-eight.

General and special terms of the supreme or county courts, and circuit courts, and courts of oyer and terminer, may be adjourned to be held on any future day, by an entry to be made in the minutes of the court; and juries may be drawn and summoned for an adjourned circuit or county court, or an adjourned court of oyer and terminer, and causes may be noticed for trial at an adjourned circuit or county court, in the same manner as if such courts were held by original appointment.

And special terms may be adjourned to be held at a future day at the chambers of any justice of said court residing within the district, by an entry in the same manner, and then adjourned from time to time, as the justice holding the same shall order and direct.

§ 25. [26.] *Publication of appointment.*

Every appointment so made shall be immediately transmitted to the secretary of state, who shall cause it to be published in the newspaper, printed at Albany, in which legal notices are required to be inserted, at least once in each week, for three weeks before the holding of any court in pursuance thereof. The expense of the publication shall be paid out of the treasury of the State.

§ 26. [28.] *Inability of judge.*

In case of the inability, for any cause, of a judge assigned for that purpose, to hold a special term or circuit court, or sit at a general term, or preside at a court of oyer and terminer, any other judge may do so.

§ 27. [30.] (Am'd 1849.) *Business out of court.—Proceedings in first district.*

The judges shall, at all reasonable times, when not engaged in holding court, transact such other business as may be done out of court. Every proceeding commenced before one of the judges, in the first judicial district, may be continued before another, with the same effect as if commenced before him.

§ 28. [31.] *Rooms, &c.*

The supervisors of the several counties shall provide the courts appointed to be held therein with room, attendants, fuel, lights,

Article 11, Part 1, Code of Procedure

and stationery, suitable and sufficient for the transaction of their business. If the supervisors neglect, the court may order the sheriff to do so; and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge.

TITLE IV.

Of the County Courts.

SECTION 29. Repeal of existing statutes.

- 80. Jurisdiction.
- 81. General terms.
- 82. Jurors.

§ 29. [32.] *Repeal of existing statutes.*

All statutes now in force conferring or defining the jurisdiction of the county courts, so far as they conflict with this act, are repealed; and those courts shall have no other jurisdiction than that provided in the next section. But the repeal contained in this section shall not affect any proceedings now pending in those courts.

§ 30. [33.] (Am'd 1849, 1851, 1852, 1860.) *Jurisdiction.*

The county court has jurisdiction in the following special cases, but has no original civil jurisdiction except in such cases:

1. Civil actions in which the relief demanded is the recovery of a sum of money not exceeding five hundred dollars, or the recovery of the possession of personal property not exceeding in value five hundred dollars, and in which all the defendants are residents of the county in which the action is brought at the time of its commencement, subject to the right of the supreme court, upon special motion, for good cause shown, to remove any such action to the supreme court before trial.

2. The exclusive power to review, in the first instance, a judgment rendered in a civil action by a justice's court in the county, or by a justice's court in cities, and to affirm, reverse, or modify such judgment.

3. The foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises situated within the county, and the collec-

tion of any deficiency on the mortgage remaining unpaid after the sale of the mortgaged premises.

4. The partition of real property situated within the county.

5. The admeasurement of dower in land situated within the county.

6. The sale, mortgage, or other disposition, of the real property, situated within the county, of an infant, or person of unsound mind.

7. To compel the specific performance by an infant heir, or other person, of a contract made by a party who shall have died before the performance thereof.

8. The care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard, residing within the county.

9. The mortgage or sale of the real property, situated within the county, of a religious corporation, and the disposition of the proceeds thereof.

10. To exercise the power and authority heretofore vested in such courts of common pleas over judgments rendered by justices of the peace, transcripts of which have been filed in the offices of the county clerks in such counties.

11. To exercise all the powers and jurisdiction conferred by statute upon the late courts of common pleas of the county, or the judges, or any judge thereof, respecting ferries; fisheries; turnpike roads; wrecks; physicians; habitual drunkards; imprisoned, insolvent, absent, concealed, or non-resident debtors; jail liberties; the removal of occupants from State lands; the laying out of railroads through Indian lands; and upon appeal from the determination of commissioners of highways; and all other powers and jurisdiction conferred by statute, which has not been repealed, on the late court of common pleas of the county, or on the county court since the late courts of common pleas were abolished, except in the trial and determination of civil actions; and to prescribe the manner of exercising such jurisdiction when the provisions of any statute are inconsistent with the organization of the county court.

12. To remit fines and forfeited recognizances, in the same cases and like manner as such power was given by law to courts of com-

mon pleas. But the first subdivision of this section shall not apply to the county courts of the counties of Kings and Erie.

13. To grant new trials, or affirm, modify, or reverse judgments in actions tried in such court upon exceptions, or case made, subject to an appeal to the supreme court. But in any action or proceeding pending in the county court, in which the county judge is for any cause incapable of acting, it shall be his duty to make a certificate of such fact, and file the same in the office of the clerk of such county court, and thereupon jurisdiction of such action or proceeding shall be vested in the supreme court, and such further proceedings shall be had therein, according to the practice of such court, as might have been had in the county court, if such cause or matter had remained therein; but all such matters shall be heard or tried in the first instance at a special term or circuit court, held in a county where such action or proceeding is situated.

§ 31. [34.] (Am'd 1849, 1851. *When open.—Terms.*)

The county court is always open for the transaction of any business for which no notice is required to be given to an opposing party. At least two terms in each county for the trial of issues of law or fact, and as many more as the county judge shall appoint, shall be held in each year at the places in the counties respectively designated by statute for holding county or circuit courts, on such days as the county judge shall from time to time appoint, and may continue as long as the court deem necessary.

Notice of such appointment shall be published in the State paper at least four weeks before any such term, and also in a newspaper, if any, printed in the county; so many of such terms as the county judge shall designate for that purpose, in such notice, may be held for the trial of issues of law, and hearing and decision of motions, and other proceedings at which no jury shall be required to attend.

§ 32. [36, 37, 38.] (Am'd 1849.) *Jurors.*

Jurors for the county courts and courts of sessions shall be drawn from the jury-box of the county, and summoned in the same manner as for the trial of issues at a circuit court.

TITLE V.

Of the Superior Court and Court of Common Pleas in the city of New York, and the Mayors' and Recorders' Courts in other cities.

SECTION 33. Jurisdiction.

- 34. Common Pleas for New York to review certain judgments.
- 35. General and special terms.
- 36. By whom held.
- 37. Judgments, where given.
- 38. Concurrence of two judges necessary.
- 39. Criers.
- 40. Superior Court, of whom to consist.
- 41. Justices of Superior Court to be elected.
- 42. How voted for.
- 43. How classified.
- 44. Vacancies, how filled.
- 45. Judges, their salaries, &c.
- 46. Terms of Superior Court.
- 47. Suits may be transferred.
- 48. Jurisdiction of transferred suits.
- 49. (Repealed.)
- 50. Appeal.
- 51. Section applied.

} *Obsolete.*

33. [39.] (Amended 1849, 1852.) *Jurisdiction.*

The jurisdiction of the superior court of the city of New York, of the court of common pleas for the city and county of New York, of the mayors' courts of cities, and of the recorders' courts of cities, shall extend to the following actions:

1. To the actions enumerated in sections 123 and 124, when the cause of action shall have arisen, or the subject of the action shall be situated, within those cities respectively;
2. To all other actions where all the defendants reside, or are personally served with the summons, within those cities respectively, or where one or more of several defendants, jointly liable on contract, reside, or are personally served with the summons, within those cities respectively; except in the case of mayors' and recorders' courts of cities, which courts shall only have jurisdiction where all the defendants reside within the cities in which such courts are respectively situated. The supreme court may remove into that court any action brought under this subdivision and pending in the superior court or court of common pleas for the city and county of New York, and may change the place of trial therein, as if such

action had been commenced in the supreme court; such order for removal and for change of place of trial to be made in the supreme court upon motion; and on filing a certified copy of such order in the office of the clerk of the superior court, or of the court of common pleas, such cause shall be deemed to be removed into the supreme court, which shall proceed therein as if the same had originally been commenced there; and the clerk with whom such order is filed must forthwith deliver to the clerk of the county in which, by such order, the trial is ordered to be had, to be filed in his office, all process, pleadings, and proceedings relating to such cause. And any action or proceeding pending in any mayor's or recorder's court, in which the judge is for any cause incapable of acting, may, by such court, be transferred to the county court of the county; and thereupon the papers therein on file in the mayor's or recorder's court shall be transmitted to the county court; which shall thenceforth have jurisdiction of such action or proceeding.

3. To actions against corporations created under the laws of this State, and transacting their general business, or keeping an office for the transaction of business, within those cities respectively, or established by law therein, or created by or under the laws of any other State, government, or country, for the recovery of any debt, or damages, whether liquidated or not, arising upon contract made, executed, or delivered within the State, or upon any cause of action arising therein.

§ 34. [40.] (Am'd 1849.) *Common pleas to review certain judgments*

The court of common pleas for the city and county of New York, shall also have power to review the judgments of the marine court of the city of New York, and of the justice's courts in that city.

§ 35. [41.] *Terms.*

The superior court of the city of New York, and the court of common pleas for the city and county of New York, shall, within twenty days, appoint general and special terms of those courts, respectively, and prescribe the duration thereof; and they may, from time to time, respectively alter such appointments; and here-

after no fees shall be paid for any service of a judge of either of those courts.

§ 36. [42.] *By whom held.*

A general term shall be held by at least two of the judges of those courts respectively, and a special term by a single judge.

§ 37. [43.] *Judgments, where given.*

Judgments upon appeal shall be given at the general term; all others, at the special term.

§ 38. [44.] *Judgment, how pronounced.*

The concurrence of two judges shall be necessary to pronounce a judgment at the general term. If two do not concur, the appeal shall be reheard.

§ 39. *Crier.*

A crier shall be appointed by the superior court of the city of New York, and by the court of common pleas for the city and county of New York, respectively, to hold his office during the pleasure of the court. He shall receive a salary, to be fixed by the supervisors of the city and county of New York, and paid out of the county treasury.

§ 40. *Superior Court.*

The superior court of the city of New York shall, from the first day of May, 1849, consist of six justices.

[Sections 41 to 45, inclusive, obsolete.]

§ 46. *Terms.*

A general term of the superior court may be held by any two of the six justices thereof, and a special term by any one of them; and general and special terms, one or more of them, may be held at the same time.

§ 47. [As am'd Laws 1851, p. 8.] *Certain suits may be transferred.*

All civil suits at issue at the time of the passage of this act, that from and after the first of May, 1849, shall be placed upon the calendar of the supreme court, at any general or special term

thereof to be held in the city of New York, and which shall be in readiness for hearing on questions of law only, or are equity cases, may by an order of that court, or of the judge holding such special term, be transferred to the said superior court of the city of New York, and to be heard at the general terms thereof.

§ 48. *Jurisdiction of transferred suits.*

The said superior court shall have jurisdiction of every suit so transferred to it, and may exercise the same powers in respect to every such suit, and any proceedings therein, as the supreme court might have exercised, if the suit had remained in that court.

[Section 49 was repealed, Laws 1851, p. 8.]

§ 50. *Appeal.*

Appeals from the judgments of the superior court in such suits may be taken to the court of appeals, in the same manner as from the judgments of the superior court in actions originally commenced therein.

§ 51. *Section applied.*

The provisions of section twenty-eight of this act shall apply to the said superior court.

TITLE VI.

Of the Courts of Justices of the Peace.

- SECTION 52. Repeal of existing provisions.
53. Jurisdiction.
54. No jurisdiction in certain cases.
55. Answer of title.
56. Undertaking.
57. Suit discontinued.
58. If undertaking not given.
59. The same.
60. New action.
61. Costs.
62. Answer of title as to one cause of action.
63. Docketing judgments.
64. Rules.

§ 52. [45.] (Am'd 1849.) *Repeal of existing provisions.*

The provisions contained in sections two, three, and four, of the article of the revised statutes entitled, "Of the jurisdiction of jus-

tices' courts," as amended by sections one and two of the act concerning justices' courts, passed May 14, 1840, and the provisions contained in sections 59 to 66 of the same article, both inclusive, are repealed; and the provisions of this title substituted in place thereof. But this repeal shall not affect any action heretofore commenced in a court of a justice of the peace.

§ 53. [46.] (Am'd 1849, 1851, 1860, 1861, 1862.) *Jurisdiction.*

Justices of the peace shall have civil jurisdiction in the following actions, and no others, excepting as in the second section it is provided:

1. In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed two hundred dollars.

2. An action for damages for injury to rights pertaining to the person, or to the personal or real property, if the damages claimed do not exceed two hundred dollars.

3. An action for a penalty not exceeding two hundred dollars.

4. An action commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed two hundred dollars.

5. An action upon bond conditioned for the payment of money, not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by instalments, an action may be brought for each instalment as it becomes due.

6. An action upon a surety bond taken by them; though the penalty or amount claimed exceed two hundred dollars.

7. An action upon a judgment rendered in a court of justice of the peace, or by a justice or other inferior court in the city where such action is not prohibited by section 71.

8. To take and enter judgment on the confession of a defendant, where the amount confessed shall not exceed five hundred dollars, in the manner prescribed by article 8, title 4, chapter 2, of part 3, of the revised statutes.

9. An action for damages for fraud in the sale, purchase, or exchange of personal property, if the damages claimed do not exceed two hundred dollars.

10. An action to recover the possession of personal property

claimed, the value of which, as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of one hundred dollars.

The plaintiff in such action, at the time of issuing the summons, but not afterwards, may claim the immediate delivery of such property as hereinafter provided.

Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, his agent, or attorney, shall make proof by affidavit, showing:

1. That the plaintiff is the owner, or entitled to immediate possession, of the property claimed, particularly describing the same.

2. That such property is wrongfully withheld or detained by the defendant.

3. The cause of such detention or withholding thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That said personal property has not been taken for any tax, fine, or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of said plaintiff; or if so seized, that it is exempt from such seizure by statute.

5. The actual value of said personal property.

On receipt of such affidavit, and an undertaking, in writing, executed by one or more sufficient sureties, to be approved by the justice of the peace before whom such action is commenced, to the effect that they are bound in double the value of such property as stated in said affidavit, for the prosecution of said action, and for the return of said property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against said plaintiff, the justice shall indorse upon said affidavit a direction to any constable of the county in which said justice shall reside, requiring said constable to take the property described therein from the defendant, and keep the same, to be disposed of according to law; and the said justice shall at the same time issue a summons directed to the defendant, and requiring him to appear before said justice at a time and place to be therein specified, and not more than twelve days from the date thereof, to answer the complaint of said plaintiff; and the said

summons shall contain a notice to the defendant that, in case he shall fail to appear at the time and place therein mentioned, the plaintiff will have judgment for the possession of the property described in said affidavit, with the costs and disbursements of said action.

The constable to whom said affidavit, indorsement, and summons shall be delivered, shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall thereupon, without delay, serve upon said defendant a copy of such affidavit, notice, and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable age and discretion. And shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the justice who issued the said summons.

The defendant may at any time after such service, and at least two days before the return-day of said summons, serve upon plaintiff, or upon the constable who made such service, a notice in writing that he excepts to the sureties in said bond or undertaking; and if he fail to do so, all objection thereto shall be waived. If such notice be served, the sureties shall justify, or the plaintiff give new sureties on the return-day of said summons, who shall then appear and justify, or said justice shall order said property delivered to defendant, and shall also render judgment for defendant's costs and disbursements.

At any time before the return-day of said summons, the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him, upon giving to the plaintiff, and filing the same with the justice, a written undertaking, with one or more sureties, who shall justify before said justice on the return-day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against said defendant; and if such return be

not required before the return-day of said summons, the property shall be delivered to said plaintiff.

The qualification of sureties, and their justification under this act, shall be the same as provided in sections one hundred and ninety-four and one hundred and ninety-five of the Code in respect to bail on arrest in the supreme court.

Sections two hundred and fourteen, two hundred and fifteen, and two hundred and sixteen, of the Code, shall apply to proceedings and actions brought under this act, substituting the word constable for the word sheriff whenever it occurs in either of said sections.

The actions so commenced shall be tried in all respects as other actions are tried in justices' courts.

In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant, by answer, shall claim a return thereof, the justice or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the justice shall render judgment accordingly, with costs and disbursements.

If it shall appear by the return of a constable that he has taken the property described in the plaintiff's affidavit, and that defendant cannot be found, and has no last place of abode in said county, or that no agent of defendant could be found on whom service could be made, the justice may proceed with the cause in the same manner as though there had been a personal service.

For the indorsement on said affidavit, the justice shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

§ 54. [47.] *No jurisdiction in certain cases.*

But no justice of the peace shall have cognizance of a civil action—

1. In which the people of this State are a party, excepting for penalties not exceeding one hundred dollars ;
2. Nor where the title to real property shall come in question, as provided by sections 55 to 62, both inclusive ;
3. Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction ;

4. Nor of a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars ;

5. Nor of an action against an executor or administrator as such.

§ 55. [48.] *Answer of Title.*

In every action brought in a court of justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defence, set forth in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same and deliver it to the plaintiff.

§ 56. [49.] Am'd 1851, 1858.) *Undertaking to be given.*

At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at least one sufficient surety, and approved by the justice, to the effect that if the plaintiff shall, within twenty days thereafter, deposit with the justice a summons and complaint in an action in the supreme court for the same cause, the defendant will, within twenty days after such deposit, give an admission in writing of the service thereof.

Where the defendant was arrested in the action before the justice, the undertaking shall further provide, that he will, at all times, render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable not exceeding one hundred dollars.

§ 57. [50.] (Am'd 1851, 1858.) *Action discontinued.—Costs.*

Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the supreme court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff.

§ 58. [51.] *If undertaking be not given.*

If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause, and shall proceed therein ; and the defend-

ant shall be precluded, in his defence, from drawing the title in question.

§ 59. [52.] (Am'd 1849.) *The same.*

If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for the costs.

§ 60. [53.] (Am'd 1851, 1858.) *Another action may be brought.*

When a suit before a justice shall be discontinued by the delivery of an answer and undertaking, as provided in sections 55, 56, and 57, the plaintiff may prosecute an action for the same cause in the supreme court, and shall complain for the same cause of action only on which he relied before the justice; and the answer of the defendant shall set up the same defence only which he made before the justice.

§ 61. [54.] (Am'd 1851, 1858.) *Costs.*

If the judgment in the supreme court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

§ 62. [55.] (Am'd 1849, 1851, 1858, 1860.) *Answer of title as to one cause of action.—Transfer of cases to supreme court.*

If, in an action before a justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and as to such cause the defendant shall answer and deliver an undertaking, as provided in sections fifty-five and fifty-six, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the supreme court. As to the other causes of action, the justice may continue his proceedings.

All actions pending in any county court on the seventh day of May, eighteen hundred and fifty-eight, in all cases in which a plea of title was interposed in actions originally commenced in a justice's court, are transferred to and vested in the supreme court,

with full power and jurisdiction to proceed therein, as commenced in said supreme court, by reason of a plea of title having been interposed in a justice's court in like cases.

§ 63. [56.] (Am'd 1849.) *Docketing justices' judgments.*

A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket; and from that time the judgment shall be a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing the transcript. But no such judgment for a less sum than twenty-five dollars, exclusive of costs, hereafter docketed, shall be a lien upon, or enforced against, real property.

§ 64. [57.] (Am'd 1849, 1851, 1852, 1860.) *Rules.*

The following rules shall be observed in the courts of justices of the peace :

1. The pleadings in these courts are—
 1. The complaint by the plaintiff;
 2. The answer by the defendant.
2. The pleadings may be oral or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.
3. The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.
4. The answer may contain a denial of the complaint, or of any part thereof, and also notice, in a plain and direct manner, of any facts constituting a defence.
5. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

6. Either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken as true.

7. If the court deem the objection well founded, it shall order the pleading to be amended; and if the party refuse to amend, the defective pleading shall be disregarded.

8. In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case.

9. In an action or defence founded upon an account, or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off.

10. A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.

11. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require, as a condition of an amendment, the payment of costs to the adverse party.

12. Execution may be issued on a judgment, heretofore or hereafter rendered in a justice's court, at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13. If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner, as other executions and judgments of the county court, except as provided in section 63.

14. The court may, at the joining of issue, require either party, at the request of the other, at that or some other specified time, to

to his account on demand, or state the nature thereof as far as may be in his power, and, in case of his default, preclude him from giving evidence of such parts thereof as shall not have been exhibited or stated.

The provisions of this act respecting forms of action, particular actions, the rules of evidence, the times of commencing suits, and the service of process upon corporations, shall apply to the courts.

A defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings are had in the action, determine whether he will accept or refuse such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof and render judgment accordingly. If notice of acceptance be given, and if the plaintiff fail to obtain judgment for a greater sum, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs from the date subsequent to the offer.

TITLE VII.

Of Justices' and other Inferior Courts in Cities.

- ARTICLE I. Marine court in New York city.
- II. Justices' courts in New York city.
- III. Justices' courts in cities.
- IV. General provisions.

CHAPTER I.

Marine Court of New York City.

CHAPTER II.

Justices' Courts in New York City.

Sections in this and the preceding chapter of this title (ss. 65, 66), have been entirely abrogated by subsequent laws.

CHAPTER III.

The Justices' Courts of Cities.§ 67. [60.] *Jurisdiction.*

The justices' courts of cities shall have jurisdiction in the following cases, and no other:

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or by-laws of the corporations of their respective cities, where the penalty or forfeiture shall not exceed one hundred dollars.

CHAPTER IV.

General Provisions.

§ 68. [61.] (Am'd 1849, 1851.) *Sections 55 and 64 applicable to this title.*

The provisions of sections 55 to 64, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketing transcripts of judgments, to their effect and the mode of enforcing them, and to proceedings where title to real property shall come in question, shall apply to the courts embraced in this title, except that, after the discontinuance of the actions in the inferior court, upon an answer of title, the new action may be brought either in the supreme court, or in any other court having jurisdiction thereof; and except, also, that in the city and county of New York, a judgment for twenty-five dollars or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as, and be deemed a judgment of the court of common pleas for the city and county of New York.

There is no County Ct. in city of New York.

PART II.

OF CIVIL ACTIONS.

- TITLE I. OF THEIR FORM.
- II. OF THE TIME OF COMMENCING THEM.
- III. OF THE PARTIES.
- IV. OF THE PLACE OF TRIAL.
- V. OF THE MANNER OF COMMENCING THEM.
- VI. OF THE PLEADINGS.
- VII. OF THE PROVISIONAL REMEDIES.
- VIII. OF THE TRIAL AND JUDGMENT.
- IX. OF THE EXECUTION OF THE JUDGMENT.
- X. OF THE COSTS.
- XI. OF APPEALS.
- XII. OF THE MISCELLANEOUS PROCEEDINGS.
- XIII. ACTIONS IN PARTICULAR CASES.
- XIV. PROVISIONS RELATING TO EXISTING SUITS.
- XV. GENERAL PROVISIONS.

TITLE I.

Form of Civil Actions.

- SECTION 69. Distinction between actions at law and suits in equity abolished.
- 70. Parties, how designated.
 - 71. Actions on judgments.
 - 72. Feigned issues abolished.

§ 69. [62.] (Am'd 1849.) *Distinction between actions at law and suits in equity abolished.*

The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

§ 70. [63.] (Am'd 1849.) *Parties, how designated.*

In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

§ 71. [64.] *Actions on judgments.*

No action shall be brought upon a judgment rendered in any court of this State, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

§ 72. [65.] *Existing suits. Feigned issues abolished.*

Feigned issues are abolished; and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

TITLE II.

Time of commencing civil actions.

- CHAPTER I. Actions generally.
 II. For the recovery of real property.
 III. Other than for the recovery of real property.
 IV. General provisions.

CHAPTER I.

Time of commencing Actions in general.

- SECTION 73. Repeal of existing limitations.
 74. Time for commencing actions, &c.

§ 73. [66.] (Am'd 1849.) *Repeal of existing limitations.*

The provisions contained in the chapter of the revised statutes, entitled "Of actions and the times of commencing them," are re-

If owner of a judgment wishes to
 assign it, he must first
 assign it to the
 assignee.

feigned issue was
 generally in form
 of wages

pealed, and the provisions of this title are substituted in their stead. This title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

§ 74. [67.] (Am'd 1849; 1851.) *Period of limitation, answer, &c.*

Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section seventy-three.

But the objection that the action was not commenced within the time limited, can only be taken by answer.

CHAPTER II.

Time of commencing Actions for the recovery of Real Property.

- SECTION 75. When the people will not sue.
76. When action cannot be brought by grantee from the State.
77. When actions by the people or their grantees to be brought within twenty years.
78. Seizin within twenty years, when necessary.
79. Seizin within twenty years, when necessary in action or defence founded on title, &c.
80. Action after entry, or right of entry.
81. Possession, when presumed. Occupation, when deemed under legal title.
82. Occupation under written instrument, &c.
83. Adverse possession under written instrument, &c.
84. Premises actually occupied, held adversely.
85. Adverse possession under claim of title not written.
86. Relation of landlord and tenant, as affecting adverse possession.
87. Descent cast. Effect of.
88. Persons under disability.

§ 75. *When the people will not sue.*

The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless,

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same shall be commenced; or unless,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years.

§ 76. *When action cannot be brought by grantee from the State.*

No action shall be brought for, or in respect to, real property, by any person claiming by virtue of letters patent or grants from the people of this State, unless the same might have been commenced by the people, as herein specified, in case such patent or grant had not been issued or made.

§ 77. *When actions by the people or their grantees to be brought within twenty years.*

When letters patent or grants of real property shall have been issued or made by the people of this State, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the people of this State, or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after such determination was made, but not after that period.

§ 78. *Seizin within twenty years, when necessary.*

No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

§ 79. *Seizin within twenty years, when necessary in action or defence founded on title.*

No cause of action or defence to an action founded upon the title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor or grantor of

such person was seized or possessed of the premises in question, within twenty years before the committing of the act in respect to which such action is prosecuted or defence made.

§ 80. *Action after entry or right of entry.*

No entry upon real estate shall be deemed sufficient, or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

§ 81. *Possession presumed. Occupation, when deemed under legal title.*

In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.

§ 82. *Occupation under written instrument.*

Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for twenty years, —the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

§ 83. *Adverse possession.*

For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a

judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial inclosure;
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant;

4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 84. *Premises actually occupied held adversely.*

Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

§ 85. *Adverse possession under claim not written.*

For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure;
2. Where it has been usually cultivated or improved.

§ 86. *Relation of landlord and tenant.*

Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

§ 87. *Descent cast.*

The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

§ 88. *Persons under disabilities.*

If a person entitled to commence any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either—

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence for a term less than for life; or,

4. A married woman;

the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defence; but such action may be commenced, or entry or defence made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defence made, after that period.

*It would appear
that less than 20*

CHAPTER III.

Time of commencing Actions other than for the recovery of Real Property.

SECTION 89. *Limitation prescribed.*

90. Twenty years.

91. Six years.

92. Three years.

93. Two years.

94. One year.

95. Action upon a current account.

96. Action for penalties.

97. Action for other relief.

98. Action by the people.

§ 89. [69.] (Am'd 1849.) *Periods of limitation prescribed.*

The periods prescribed in section 74 for the commencement of actions other than for the recovery of real property shall be as follows:

§ 90. [70.] (Am'd 1849.) *Twenty years.*

Within twenty years:

1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.
2. An action upon a sealed instrument.

§ 91. [71.] (Am'd 1849.) *Six years.*

Within six years:

1. An action upon a contract, obligation or liability, express or implied, excepting those mentioned in section 90.
2. An action upon a liability created by statute, other than a penalty or forfeiture.
3. An action for trespass upon real property.
4. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.
5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.
6. An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud. *

§ 92. [72.] (Am'd 1849.) *Three years.*

Within three years:

1. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.
2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this State, except where the statute imposing it prescribes a different limitation.

at law of common law - not discovery of fraud.

§ 93. [73.] *Two years.*

Within two years:

1. An action for libel, slander, assault, battery, or false imprisonment.
2. An action upon a statute, for a forfeiture or penalty to the people of this State.

§ 94. [74.] *One year.*

Within one year:

1. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

§ 95. [75.] Am'd 1849.) *Action upon a current account.*

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

§ 96. [76.] *Actions for penalties, &c.*

An action upon a statute, for a penalty or forfeiture given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter in behalf of the people of this State, by the attorney-general, or the district attorney of the county where the offence was committed.

§ 97. [77.] *Actions for other relief.*

An action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued.

§ 98. [78.] (Am'd 1849.) *Actions by the people.*

The limitations prescribed in this chapter shall apply to actions brought in the name of the people of this State, or for their benefit, in the same manner as to actions by private parties.

§ 98. Cass. in line
enumerated in 391(b)

CHAPTER IV.

General provisions as to the Time of Commencing Actions.

- SECTION 99. When action deemed commenced.
 100. Exception, defendant out of State.
 101. Exception as to person under disabilities.
 102. Death of person entitled before limitation expires.
 103. Suits by aliens.
 104. Where judgment reversed.
 105. Stay of action by injunction, &c.
 106. Disability must exist when right accrued.
 107. Two or more disabilities.
 108. This title when not to apply.
 109. The like.
 110. New promise must be in writing.

§ 99. [79.] (Am'd 1849, 1851.) *When action deemed commenced.*

An action is commenced as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; as, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

§ 100. [80.] (Am'd 1849, 1851.) *Exception, defendant out of State.*

If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

3 Selden? Christopher v. Carr {3 Selden

for diff. let. a. Carr v. Carr

words return

in absence? Alcott v. Troy R.R. Co. Smith

it has already been held in 12 cases that cause of action accrues

in case not upon return of plaintiff of return of a minor for return of

§ 101. [81.] (Am'd 1849, 1851, 1852.) *Exceptions, persons under disabilities.*

If a person entitled to bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued, either,

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge; or, in execution under the sentence of a criminal court, for a term less than his natural life; or,
4. A married woman;

the time of such disability is not a part of the time limited for the commencement of the action; except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; nor can it be so extended in any case longer than one year after the disability ceases.

§ 102. [82.] (Am'd 1849.) *Death of person entitled before limitation expires.*

If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrator after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

§ 103. [83.] *Actions by aliens.*

When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

§ 104. [84.] (Am'd 1863.) *Where judgment reversed.*

If an action shall be commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plain-

tiff, or, if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

§ 105. [85.] (Am'd 1849.) *Time of stay by injunction, &c.*

When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

§ 106. [86.] *Disability must exist when right of action accrued.*

No person shall avail himself of a disability, unless it existed when his right of action accrued.

§ 107. [87.] (Am'd 1849.) *Where several disabilities, all must be removed.*

When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

§ 108. [88.] *This title not applicable to bills, &c., of corporations, or to bank notes.*

This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

§ 109. [89.] (Am'd 1849.) *Nor to actions against directors, &c., of moneyed corporations or banking associations. Limitation in such cases prescribed.*

This title shall not affect actions against directors or stockholders of a moneyed corporation, or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

§ 110. [90.] (Am'd 1849.) *Acknowledgment or new promise must be made in writing.*

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the

operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

TITLE III.

Parties to Civil Actions.

- SECTION 111. Party in interest to sue. Action by grantee of land held adversely.
- 112. Assignment of thing in action.
 - 113. Actions by executor, trustee, &c.
 - 114. Actions by and against married women.
 - 115. Infants, actions by and against.
 - 116. Guardian, how appointed.
 - 117. Who may be plaintiffs.
 - 118. Who may be defendants.
 - 119. One or more may sue or defend for all.
 - 120. One action against the different parties to bills and notes.
 - 121. Action when not to abate.
 - 122. Court to decide controversy, &c. Interpleading.

§ 111. [91.] (Am'd 1849, 1851, 1862.) *Action to be by party in interest. Action by grantee of land held adversely.*

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section one hundred and thirteen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

§ 112. [92.] (Am'd 1849.) *Assignment of thing in action.*

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

§ 113. [93.] (Am'd 1851.) *Action by executor, trustee, &c.*

An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

§ 114. [94.] (Am'd 1851, 1857.) *Action by and against a married woman.*

When a married woman is a party, her husband must be joined with her, except that,

1. When the action concerns her separate property, she may sue alone; *as by sued by recent St.*
2. When the action is between herself and her husband, she may sue or be sued alone. ✕

And in no case need she prosecute or defend by a guardian or next friend.

§ 115. [95.] (Am'd 1849.) *Infant to appear by guardian.*

When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

Cot. 1.2. at a term.

Judge 1.2. at Cham.

§ 116. [96.] (Am'd 1851, 1852, 1862, 1863.) *Appointment of guardian.*

The guardian shall be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application

of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State; if he has none, then to the infant himself, if over fourteen years of age, and within the State; or if under that age, and within the State, to the person with whom such infant resides.

And in actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this State, the plaintiff may apply to the court in which the action is pending, at any special term thereof, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant, for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant; and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant himself, or by service upon any relation or person with whom the infant resides, and either by mail or personally upon the person so served.

And in case an infant defendant, having an interest in the event of the action, shall reside in any State with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian *ad litem*, for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian *ad litem*, process, pleadings and notices in the action may be served, in the like manner as upon a party residing in this State.

§ 117. [97.] *Who to be plaintiffs.*

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

§ 118. [98.] (Am'd 1849.) *Who to be defendant.*

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

+

§ 119. [99.] (Am'd 1849.) *Parties to be joined, &c.*

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

§ 120. [100.] *Parties to bills and notes, &c.*

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff.

§ 121. [101.] (Am'd 1849, 1857, 1862.) *Existing suits. Action when not to abate.*

No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper par-

ties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order.

§ 122. [102.] (Am'd 1849, 1851.) *Court may determine controversy, &c. Interpleader.*

The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

A defendant against whom an action is pending upon a contract, or for specific, real, or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order.

TITLE IV.

Of the Place of Trial of Civil Actions.

- SECTION 123. Actions to be tried where subject-matter situated.
 124. Actions to be tried where cause of action arose.
 125. Actions to be tried where the parties reside.
 126. Changing place of trial.

§ 123. [103.] (Am'd 1849.) *Actions to be tried where subject-matter situated.*

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated,

subject to the power of the court to change the place of trial, in the cases provided by statute:

- 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property;
2. For the partition of real property;
3. For the foreclosure of a mortgage of real property;
4. For the recovery of personal property distrained for any cause.

§ 124. [104.] (Am'd 1849.) *Actions to be tried where cause of action arose.*

Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial, in the cases provided by statute:

1. For the recovery of a penalty or forfeiture imposed by statute, except that, when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offence was committed;

2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer.

§ 125. [105.] *Action to be tried where parties reside.*

In all other cases the action shall be tried in the county in which the parties, or any of them, shall reside at the commencement of the action; or, if none of the parties shall reside in the State, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

§ 126. [105.] (Am'd 1851.) *Change of place of trial.*

If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried

134

§ 123 + 124 -

therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as is provided in this section.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose in the complaint is not the proper county;
2. When there is reason to believe that an impartial trial cannot be had therein;
3. When the convenience of witnesses and the ends of justice would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

TITLE V.

Manner of Commencing Civil Actions.

- SECTION 127. Actions, how commenced.
 128. Summons, requisites of.
 129. Notice to be inserted in summons.
 130. Complaint need not be served with summons.
 131. Defendant unreasonably defending.
 132. Notice of lis pendens.
 133. Service of summons.
 134. Return of summons.
 135. Publication of summons.
 136. Proceedings when part only of defendants served.
 137. When service by publication complete.
 138. Proof of service.
 139. When jurisdiction of action acquired.

§ 127. [106.] *Actions, how commenced.*

Civil actions in the courts of record of this State shall be commenced by the service of a summons.

§ 128. [107.] *Summons, requisites of.*

The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose

Name of defendant

name is subscribed to the summons, at a place within the State, to be therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service.

§ 129. [108.] (Am'd 1849.) *Notice to be inserted in summons.*

The plaintiff shall also insert in the summons a notice, in substance as follows:

1. In an action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint, in twenty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint within twenty days after service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

§ 130. [109.] (Am'd 1849, 1851.) *Service of complaint.*

A copy of the complaint need not be served with the summons. In such case, the summons must state where the complaint is or will be filed; and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and, in person or by attorney, demands, in writing, a copy of the complaint, specifying a place within the State where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly; and after such service, the defendant has twenty days to answer; but only one copy need be served on the same attorney.

§ 131. [110.] (Am'd 1851.) *Notice of no personal claim.*

In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the time for answering he shall, in writing, demand the same. If a defendant on whom such notice is served unreasonably defend the action, he shall pay costs to the plaintiff.

132. [111.] (Am'd 1849, 1851, 1857, 1858, 1862.) *Notice of pendens.*

In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, or when a warrant of attachment, under chapter four of title seven, second, of this Code, shall be issued, or at any time afterwards, the plaintiff, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before the mortgage is foreclosed, and must contain the date of the mortgage, the parties to it, and the time and place of recording the same. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were made a party to the action.

For the purposes of this section an action shall be deemed to be pending from the time of the filing of such notice; provided, however, that such notice shall be of no avail, unless it shall be followed by the first publication of the summons on an order therefor, or by personal service thereof on a defendant within sixty days after the filing.

And the court in which the said action is pending may, in its discretion, at any time after the action shall have become abated, order the removal of the action to any other county, provided in section number one hundred and twenty-one, on the ground of cause shown, and on application of any party aggrieved, after the action shall have become abated, as is provided in section one hundred and twenty-one, direct the notice authorized by this section to be removed from record by the clerk of any county in which the office the same may have been filed.

133. [112.] *Summons, by whom served.*

The summons may be served by the sheriff of the county where

the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned with proof of the service to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons may, at his option, by an endorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly.

§ 134. [113.] (Am'd 1849, 1851, 1859.) *Service of summons.*

The summons shall be served by delivering a copy thereof as follows:

1. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose therein, or where such service shall be made within this State personally upon the president, treasurer, or secretary thereof.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian; or, if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed, to such committee and to the defendant personally.

4. In all other cases, to the defendant personally.

§ 135. [114.] (Am'd 1849, 1851, 1858, 1860.) *Service by publication.*

Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, or of the county judge of the county where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real

property in this State, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases:

1. Where the defendant is a foreign corporation, has property within the state, or the cause of action arose therein;

2. Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent;

3. Where he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action;

4. Where the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein;

5. Where the action is for divorce, in the cases prescribed by law.

The order must direct the publication to be made in two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, is equivalent to publication and deposit in the post-office.

The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years

after its rendition, on such terms as may be just; and if the defence be successful, and the judgment or any part thereof have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. And in all cases where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing.

In actions for the foreclosure of mortgages on real estate, already instituted, or hereafter to be instituted, if any party or parties having any interest in or lien upon such mortgaged premises are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear, by affidavit, to the court, or to a justice thereof, or to the county judge of the county where the trial is to be had, such court, justice, or county judge may grant an order that the summons be served on such unknown party or parties by publishing the same for six weeks, once in each week successively, in the State paper, and in a newspaper printed in the county where the premises are situated, which publication shall be equivalent to a personal service on such unknown party or parties.

§ 136. [115.] (Am'd 1849, 1851.) *Joint and several debtors.*

Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

2. If the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be

taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone.

§ 137. [116.] *When service complete.*

In the cases mentioned in section 135, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

§ 138. [117.] (Am'd 1851.) *Proof of service.*

Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the sheriff, his certificate thereof; or,
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, as required by law, if the same shall have been deposited; or,
4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate, affidavit or admission must state the time and place of the service.

§ 139. (Am'd 1851.) *Jurisdiction. Appearance.*

From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

Rule 18, 1851

Handwritten notes:
 The court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

TITLE VI.

Of the Pleadings in Civil Actions.

- CHAPTER I. The complaint.
II. The demurrer.
III. The answer.
IV. The reply.
V. General rules of pleading.
VI. Mistakes and amendments.

CHAPTER I.

The Complaint.

- SECTION 140. Forms of pleading.
141. Complaint.
142. Complaint, what to contain.

§ 140. [118.] (Am'd 1849, 1852.) *Forms of Pleading.*

All the forms of pleading heretofore existing are abolished; and, hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act.

§ 141. [119.] *Complaint.*

The first pleading on the part of the plaintiff is the complaint.

§ 142. [120.] (Am'd 1851.) *Complaint, what to contain.*

The complaint shall contain:

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.
2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.
3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

CHAPTER II.

The Demurrer.

- SECTION 143. Defendant to demur or answer.
 144. When the defendant may demur.
 145. Demurrer, what to specify.
 146. How to proceed if complaint be amended.
 147. Objection not appearing on complaint.
 148. Objection, when waived.

§ 143. [121.] *Defendant to demur or answer.*

The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

§ 144. [122.] *When defendant may demur.*

The defendant may demur to the complaint when it shall appear upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties, for the same cause; or,
4. That there is a defect of parties, plaintiff or defendant; or,
5. That several causes of action have been improperly united;

or, **§ 147**

6. That the complaint does not state facts sufficient to constitute a cause of action.

§ 145. [123.] (Am'd 1849.) *Demurrer must specify grounds of objection.*

The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

146. [125.] (Am'd 1849.) *How to proceed if complaint be amended.*

If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the

plaintiff, upon filing with the clerk on [due] proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 246: but where an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant.

§ 147. [126.] *Objection not appearing on complaint.*

When any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer.

§ 148. [128.] (Am'd 1849.) *Objection, when deemed waived.*

If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER III.

The Answer.

- SECTION 149. Answer, what to contain.
 150. Counter-claim. Several defences.
 151. Demurrer and answer, when allowed.
 152. Sham and irrelevant defences to be stricken out.

§ 149. [128.] (Am'd 1849, 1851, 1852.) *Answer, what to contain.*
 The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;
2. A statement of any new matter constituting a defence or counter claim, in ordinary and concise language, without repetition.

§ 150. [129.] (Am'd 1849, 1852.) *Counter-claim. Several defences.*

The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between

whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

The defendant may set forth by answer as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

§ 151. *Demurrer and answer.*

The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

§ 152. (Am'd 1851.) *Sham and irrelevant defences.*

Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose.

CHAPTER IV.

The Reply.

- SECTION 153. Reply. Demurrer to answer.
154. Motion for judgment upon answer.
155. Demurrer to reply.

§ 153. [131.] (Am'd 1849, 1851, 1852, 1855, 1857, 1860.) *Reply. Demurrer to answer.*

When the answer contains new matter constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the

155 answer; and the plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims.

156 And in other cases, when an answer contains new matter constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counter-claim.

§ 154. (Am'd 1863.) *Motion for judgment on answer.*

152 If the answer contain a statement of new matter constituting a counter-claim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued.

§ 155. *Demurrer to reply.*

If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

CHAPTER V.

General Rules of Pleading.

- SECTION 156. Pleadings to be subscribed and verified.
 157. Pleadings, how verified.
 158. How to state an account in pleading.
 159. Pleadings to be liberally construed.
 160. Irrelevant or redundant matter to be stricken out, and indefinite matter made more definite.
 161. Judgments, how to be pleaded.
 162. Conditions precedent, how to be pleaded.
 163. Private statutes, how to be pleaded.
 164. Libel and slander, how stated in complaint.
 165. Answer in such cases.
 166. Answer in actions to recover property distrained for damage.
 167. What causes of action may be joined.
 168. Allegation not denied, when to be deemed true.

§ 156. [183.] (Am'd 1849, 1851.) *Pleadings to be subscribed and verified.*

Every pleading in a court of record must be subscribed by the

party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

§ 157. [153.] (Am'd 1849, 1851.) *Pleadings, how verified.*

The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and, as to those matters, he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

§ 158. [135.] (Am'd 1849, 1851.) *Items of account. Particulars.*

It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge may order a "further account," when the one delivered is ~~defe-~~

tive; and the court may in all cases order a bill of particulars of the claim of either party to be furnished.

§ 159. [136.] *Pleadings, how construed.*

In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

§ 160. [137.] (Am'd 1849.) *Irrelevant or redundant. Indefinite or uncertain.*

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

§ 161. [138.] *Judgments, how to be pleaded.*

In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

§ 162. [139.] (Am'd 1851.) *Conditions precedent, how to be pleaded. Instrument for payment of money only.*

In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum, which he claims. *

duly - is import word in pleadings.

* This is not orig^l parties - in case of assignment it is req^d to show how title was derived - first plea to be answered to.

§ 163. [140.] *Private statutes, how to be pleaded.*

In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute, by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

§ 164. [141.] *Libel and slander, how stated in complaint.*

In an action for libel or slander, it shall not be necessary to state, in the complaint, any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

§ 165. [142.] (Am'd 1849.) *Answer in such cases.*

In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give, in evidence, the mitigating circumstances.

§ 166. *In actions to recover property distrained for damage, answer need not set forth title.*

In an action to recover the possession of property distrained doing damage, an answer, that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

§ 167. [143.] (Am'd 1849, 1852, 1863.) *What causes of action may be joined in the same complaint.*

The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of,

1. The same transaction, or transactions connected with the same subject of action;

2. Contract, express or implied; or
3. Injuries, with or without force, to person and property, or either; or
4. Injuries to character; or
5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or
6. Claims to recover personal property, with or without damages for the withholding thereof; or
7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. In actions to foreclose mortgages the court shall have power to adjudge and direct the payment, by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

§ 168. [144.] (Am'd 1849, 1852.) *"Allegation not denied, when to be deemed true.*

Every material allegation of the complaint, not controverted by the answer, as prescribed in section 149, and every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, as prescribed in section 153, shall, for purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

CHAPTER VI.

Mistakes in Pleading, and Amendments.

- SECTION 169. Material variances, how provided for.
 170. Immaterial variances, how provided for.
 171. What not to be deemed a variance.
 172. Amendments of course and after demurrer.
 173. Amendments by the court.
 174. Court may give relief in case of mistake.
 175. Suing a party by a fictitious name.
 176. No error or effect to be regarded unless it affect substantial rights.
 177. Supplemental complaint, answer, and reply.

§ 169. [145.] (Am'd 1849.) *Existing suits—Material variance.*

No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense, upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

§ 170. [146.] *Existing suits—Immaterial variance.*

Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

§ 171. [147.] *Existing suits—Failure of Proof.*

Where, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof.

§ 172. [148.] (Am'd 1849; 1851, 1859.) *Existing suits—Amendments of course and after allowance of demurrer.*

Any pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had, at any time within twenty days after it is served, or at any

Amendment before trial - At very liberal. may shape a suit
 at - If variance be made, amendment
 after - be granted to leave - the parties to
 only amendments - the support to go

time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purposes of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed; and if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 144, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

§ 173. [149.] (Am'd 1849, 1851, 1852.) *Existing suits—Amendment by order.*

The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

§ 174. [149.] (Am'd 1851.) *Existing suits—Relief in case of mistake.*

The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or, by an order, enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceed-

39
138
order but no demurrer

161

162

ing, taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may, in like manner, and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

§ 175. [150.] *Existing suits—Fictitious name.*

When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

§ 176. [151.] *Existing suits—Errors or defects to be disregarded.*

The court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

§ 177. [152.] (Am'd 1849.) *Supplemental pleading.*

The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made.

TITLE VII.

Of the Provisional Remedies in Civil Actions.

- CHAPTER I. Arrest and bail.
II. Claim and delivery of personal property.
III. Injunction.
IV. Attachment.
V. Provisional remedies.

CHAPTER I.

Arrest and Bail.

- SECTION 178. No person to be arrested in a civil action, except as prescribed.
179. Arrest in civil actions, in what cases.
180. Order for arrest, by whom to be made.
181. Affidavit to obtain order for arrest. To what actions this chapter applies.
182. Security by plaintiff before obtaining order for arrest.
183. Order for arrest, when it may be made, and its form.
184. Original affidavit and order to be delivered to sheriff, and copy to be delivered to defendant.
185. Arrest, how made.
186. Defendant to be discharged on giving bail or making a deposit.
187. Bail, how given.
188. Surrender of defendant.
189. The like.
190. Bail, how proceeded against.
191. Bail, how exonerated.
192. Delivery of undertaking of bail to plaintiff, and its acceptance or rejection by him.
193. Notice of justification. New bail.
194. Qualification of bail.
195. Justification of bail.
196. Allowance of bail.
197. Deposit in lieu of bail.
198. Payment of deposit into court.
199. Substituting bail for deposit.
200. Deposit, how disposed of after judgment in the action.
201. Sheriff, when liable as bail.
202. Proceedings on judgment against sheriff.
203. Bail liable to sheriff.
204. Vacating order of arrest or reducing bail.
205. Affidavits on motion to vacate order of arrest or reduce bail.

§ 178. [183.] *No person to be arrested, except as prescribed.*

No person shall be arrested in a civil action, except as prescribed by this act; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempt.

§ 179. [154.] (Am'd 1849, 1851, 1863.) *In what cases.*

The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action ^{not} arising out of contract, where the defendant is not a resident of the State, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property. *Sort.*

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or for property embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment. *Court.*

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof. *Replevin.*

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit. *Fraud.*

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested in any action, except for a willful injury to person, character or property.

§ 180. [155.] *Order for arrest, by whom made.*

An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 181. [156.] (Am'd 1849.) *Affidavit to obtain order. To what actions this chapter applies.*

The order may be made where it shall appear to the judge, by the affidavit of the plaintiff or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

The provisions of this chapter shall apply to all actions included within the provisions of section 179, which shall have been commenced since the thirtieth day of June, 1848, and in which judgment shall not have been obtained.

§ 182. [157.] *Security by plaintiff before order of arrest.*

Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the State, and worth double the sum specified in the undertaking, over all his debts and liabilities.

§ 183. [158.] (Am'd 1849., 1862.) *Order, when made, and its form.*

The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and return the order, at a place and time therein mentioned, to the plaintiff, or attorney by whom it shall be subscribed or indorsed.

But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days, after the service of the order of arrest, in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail.

§ 184. [159.] *Affidavit and order to be delivered to sheriff, and copy to defendant.*

The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy hereof.

§ 185. [160.] *Arrest, how made.*

The sheriff shall execute the order by arresting the defendant, and keeping him in custody until discharged by law; and may call the power of the county to his aid in the execution of the arrest, as in case of process.

§ 186. [161.] *Defendant to be discharged on bail or deposit.*

The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

§ 187. [162.] *Bail, how given.*

The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section 179, and undertaking to the same effect as that provided by section 211.

§ 188. [163.] (Am'd 1849, 1851.) *Surrender of defendant.*

At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender;
2. Upon the production of a copy of the undertaking and sher-

iff's certificate, a judge of the court, or county judge, may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision 3 of section 179, so as to discharge the bail from an undertaking given to the effect provided by section 211.

§ 189. [164.] *Surrender of defendant.*

For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

§ 190. [165.] *Bail, how proceeded against.*

In case of failure to comply with the undertaking, the bail may be proceeded against, by action only.

§ 191. [166.] (Am'd 1849.) *Bail, how exonerated.*

The bail may be exonerated, either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

§ 192. [167.] (Am'd 1849.) *Delivery of undertaking to plaintiff, and its acceptance or rejection by him.*

Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff, or attorney by whom it is subscribed, with his return indorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.

it is then diff.
from orig. text.

§ 193. [168.] (Am'd 1849, 1851.) *Notice of justification. New bail.*

On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff, or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before a judge of the court, or county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section 187.

§ 194. [169.] (Am'd 1849.) *Qualifications of bail.*

The qualifications of bail must be as follows:

1. Each of them must be a resident, and householder or freeholder, within the State.
2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

§ 195. [170.] (Am'd 1849.) *Justification of bail.*

For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, or justice of the peace, in his discretion may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

§ 196. [171.] (Am'd 1849.) *Allowance of bail.*

If the judge, or justice of the peace, find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

§ 197. [172.] *Deposit with the sheriff.*

The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

§ 198. [173.] (Am'd 1849.) *Payment of deposit into court.*

The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

§ 199. [174.] (Am'd 1849.) *Substituting bail for deposit.*

If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 193, any time before judgment; and thereupon the judge before whom the justification is had shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.

§ 200. [175.] (Am'd 1849.) *Deposit, how disposed of.*

Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

§ 201. [176.] (Am'd 1849.) *Sheriff, when liable as bail.*

If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability, by the giving and justification of bail, as provided in sections 193, 194, 195, and 196, at any time before process against the person of the defendant, to enforce an order or judgment in the action.

§ 202. [177.] *Proceedings on judgment against sheriff.*

If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

§ 203. [178.] (Am'd 1849.) *Bail liable to sheriff.*

The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for damages, which he may sustain by reason of such omission.

§ 204. [179.] (Am'd 1858.) *Vacating order of arrest, or reducing bail.*

A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

§ 205. [180.] *Affidavits on motion.*

If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

CHAPTER II.

Extended to Marine Ct 1862 L 975 L

Claim and Delivery of Personal Property.

- SECTION 206. Claim and delivery of personal property.
 207. Affidavit and its requisites.
 208. Requisition to sheriff to take and deliver the property.
 209. Security by plaintiff.
 210. Exception to sureties.
 211. Defendant, when entitled to re-delivery.
 212. Justification of defendant's sureties.
 213. Qualification and justification of sureties.
 214. Property, how taken when concealed in building or inclosure.
 215. Property, how kept.
 216. Claim of property by third person.
 217. Notice and affidavit, when and where to be filed.

§ 206. [181.] (Am'd 1849.) *Delivery of personal property.*

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time

before answer, claim the immediate delivery of such property, as provided in this chapter.

§ 207. [182.] *Affidavit and its requisites.*

Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing,

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and

5. The actual value of the property.

§ 208. [183.] *Requisition to sheriff to take and deliver the property.*

The plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

§ 209. [184.] (Am'd 1849.) *Security by plaintiff.*

Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the

same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

§ 210. [185.] *Exception to sureties.*

The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

§ 211. [186.] (Am'd 1849.) *Defendant, when entitled to re-delivery.*

At any time before the delivery of the property to the plaintiff, the plaintiff may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216.

§ 212. [187.] (Am'd 1849.) *Justification of defendant's sureties.**

The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to

the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

§ 213. [188.] (Am'd 1849.) *Qualifications and justification of sureties.*

The qualifications of sureties, and their justification, shall be as are prescribed by sections 194 and 195 in respect to bail upon an order of arrest.

§ 214. [189.] *Property, how taken when concealed in building or inclosure.*

If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

§ 215. [190.] *Property, how kept.*

When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

§ 216. *Claim of property by third person.*

If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property, by any

other person than the defendant or his agent, shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

§ 217. *Notice and affidavit, when and where to be filed.*

The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

CHAPTER III.

Injunction.

- SECTION 218. Writ of injunction abolished, and order substituted.
- 219. Temporary injunction, in what cases granted.
- 220. At what time it may be granted. Copy affidavit to be served.
- 221. Injunction after answer.
- 222. Security upon injunction. Damages, how ascertained.
- 223. Order to show cause why injunction should not be granted.
- 224. Security upon injunction to suspend business of corporation.
- 225. Motion to vacate or modify injunction.
- 226. Affidavits on motion.

§ 218. [191.] *Injunction by order.*

The writ of injunction, as a provisional remedy, is abolished, and an injunction by order is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge, in the cases provided in the next section, and, when made by a judge, may be enforced as the order of the court.

§ 219. [192.] (Am'd 1849.) *Injunction, in what cases.*

[1] Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or [2] when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in viola-

tion of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. [3] And where, during the pendency of an action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

§ 220. [193.] *At what time it may be granted. Copy affidavit to be served.*

The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

§ 221. [194.] (Am'd 1849.) *Injunction after answer.*

An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

§ 222. [195.] (Am'd 1849.) *Security upon injunction. Damages.*

Where no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

X § 223. [196.] (Am'd 1849.) *Order to show cause. Restraint in mean time.*

If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunc-

I am not sure - even in
 24 hours' notice may be sent
 before to hand cause - 5402

tion, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

§ 224. [197.] (Am'd 1849.) *Security upon injunction to suspend business of corporation.*

An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or a judge thereof. Nor shall it be granted without due notice of the application therefor, to the proper officers of the corporation, except where the people of this State are a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, after the first day of January, one thousand eight hundred and fifty, as such proceedings are or shall be provided by law, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct.

§ 225. [198.] *Motion to vacate or modify injunction.*

If the injunction be granted by a judge of the court, or by a county judge, without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

§ 226. [199.] *Affidavits on motion.*

If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

CHAPTER IV.

Attachment.

- SECTION 227. Property of foreign corporations, and of non-resident or absconding or concealed defendants, may be attached.
228. Attachment, by whom granted.
229. In what cases attachment may be issued. Affidavits to be filed.
230. Security on obtaining attachment.
231. Attachment, to whom directed, and what to require.
232. Mode of proceeding in executing attachment.
233. Proceedings in case of perishable property or vessels.
234. Interest in corporations or associations liable to attachment.
235. Attachment, how executed on property incapable of manual delivery.
236. Certificate of defendant's interest to be furnished by corporations.
237. Judgment, how satisfied.
238. When action to recover notes, &c., of defendant may be prosecuted by the plaintiff in the action in which the attachment issued.
239. Bond to sheriff on attachment, how disposed of on judgment for defendant.
240. Discharge of attachment, and return of property or its proceeds to defendant, on his appearance in the action.
241. Undertaking on the part of the defendant.
242. When sheriff to return attachment with his proceedings thereon.
243. Sheriff's fees.

§ 227. (Am'd 1857.) *Property of foreign corporations, and of non-resident or absconding or concealed defendants, may be attached.*

In an action for the recovery of (the) money against a corporation created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendant or corporation attached in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.

§ 228. *Warrant, by whom granted.*

A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 229. (Am'd 1857, 1860.) *In what cases warrant may be issued—Affidavits to be filed.*

The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keep himself concealed therein with the like intent, or that such corporation or person has removed or is about to remove any of his or its property from this State with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with the like intent, whether such defendant be a resident of this State or not.

It shall be the duty of the plaintiff procuring such warrant, within ten days after the issuing thereof, to cause the affidavits on which the same was granted to be filed in the office of the clerk of the county in which the action is to be tried.

§ 230. (Am'd 1862.) *Security on obtaining warrant.*

Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be, at least two hundred and fifty dollars.

§ 231. (Am'd 1851.) *Warrant, to whom directed, and what to require.*

The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses, the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the sheriffs of different counties.

§ 232. *Mode of proceeding in executing warrant.*

The sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon in all respects in the manner required of him by law in case of attachments against absent debtors; shall make and return an inventory; and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action; and shall, subject to the direction of the court or judge, collect and receive into his possession all debts, credits, and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct.

§ 233. *Proceedings in case of perishable property or vessels.*

If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments against absent debtors.

§ 234. *Interest in corporations or associations liable to attachment.*

The rights or shares which such defendant may have in the stock of any association or corporation, together with the interests and profits thereon, and all other property in this State of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution.

§ 235. *Attachment, how executed on property incapable of manual delivery.*

The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

§ 236. *Certificate of defendant's interest to be furnished by corporations.*

Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching, or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of or debt owing to the defendant. If such officer, debtor, or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath, concerning the same, and obedience to such order may be enforced by attachment.

§ 237. (Am'd 1859.) *Judgment, how satisfied.*

In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose,—

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel, sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment;

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the author-

ity which he had to seize the same under the attachment; and any person who shall willfully conceal or withhold such property from the sheriff, shall be liable to double damages, at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment, the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order, as to the service of notice and the time of service, as shall be deemed just.

When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

§ 238. *When action to recover notes, &c., of defendant may be prosecuted by plaintiff in the action in which the attachment issued.*

The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses on account thereof, not exceeding two hundred and fifty dollars in any one

action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

§ 239. *Bond to sheriff on attachment, how disposed of on judgment for defendant.*

If the foreign corporation, or absent or absconding or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.

§ 240. (Am'd 1862.) *Discharge of attachment, and return of property or its proceeds to defendant, on his appearance in action.*

Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.

And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may apply to the officer who issued the attachment for relief under this section.

§ 241. (Am'd 1857, 1862.) *Undertaking on the part of the defendant.*

Upon such application, the defendant shall deliver to the court or officer an undertaking executed by at least two sureties, who are residents and freeholders or householders in this State, approved by such court or officer, to the effect that such sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceed-

ing the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be less than the amount claimed by the plaintiff, the court, or officer issuing the attachment, may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies.

And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court or officer an undertaking, in accordance with the provisions of this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all the provisions of this section applicable to such undertaking shall be applied thereto.

§ 242. *When sheriff to return warrant and proceedings thereon.*

When the warrant shall be fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

§ 243. *Sheriff's fees.*

The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, under this title, as are allowed by law for like services and disbursements, under the provisions of chapter five, title one, and part two, of the Revised Statutes.

CHAPTER V.

Provisional Remedies.

§ 244. [200.] (Am'd 1851, 1852, 1857, 1858, 1862.) *Powers of court as to receivers, deposit of money, &c., in court, and other provisional remedies. Judgment for sum admitted due.*

A receiver may be appointed,—

1. Before judgment, on the application of either party, when

he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the court;⁴

2. After judgment, to carry the judgment into effect;

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment;

4. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this State of foreign corporations. Receivers of the property within this State, of foreign corporations, shall be allowed the same commissions as are allowed by law to the trustees of the estates of absconding, concealed, and non-resident debtors.

5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act.

When it is admitted, by the pleading or examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver or convey it, in conformity with the direction of the court.

When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion,

may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

TITLE VIII.

Of the Trial and Judgment in Civil Actions.

- CHAPTER I. Judgment upon failure to answer, &c.
 II. Issues and the mode of trial.
 III. Trial by jury.
 IV. Trial by the court.
 V. Trial by referees.
 VI. The manner of entering judgment.

CHAPTER I.

Judgment upon failure to answer, &c.

- SECTION 245. Judgment defined.
 246. Judgment on failure of defendant to answer, or for excess over counter-claim.
 247. Judgment on frivolous demurrer, answer or reply.

§ 245. [201.] *Judgment defined.*

A judgment is the final determination of the rights of the parties in the action.

§ 246. [202.] (Am'd 1849, 1851, 1858.) *Judgment on failure of defendant to answer, or for excess over counter-claim.*

Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of section 130, and that no answer has been received. The clerk shall thereupon enter judgment for the amount mentioned in the summons, against the defendant or defendants, or against one or more of several defendants, in the cases provided for in section 136. But if the complaint be not sworn to, and such action is on an instrument for the payment of money only, the clerk, on its production to him,

shall assess the amount due to the plaintiff thereon; and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action, from his examination, under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment. *Expedient to swear in claim for value of 5 days' notice*

Where the defendant, by his answer in any such action, shall not deny the plaintiff's claim, but shall set up a counter-claim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter-claim, in like manner in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting such counter-claim, which statement shall be annexed to and be a part of the judgment-roll.

2. In other actions the plaintiff may, upon the like proof, apply to the court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or, if the examination of a long account be involved, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint. *A Sheriff's duty mostly to assess damages. Note: If a Sheriff's duty to assess damages.*

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the State, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is

entitled to recover. Before rendering judgment the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security, to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defence.

§ 247. *Judgment on frivolous demurrer, answer or reply.*

If a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.

Here is only a note judgment is rendered by J. A. Chambers.

CHAPTER II.

Issues, and the Mode of Trial.

SECTION 248. The different kinds of issues.

- 249. Issue of law.
- 250. Issue of fact.
- 251. On issues of both law and fact, the issue of law to be first tried.
- 252. Trial defined.
- 253. Issues, how tried.
- 254. Issues triable by the court.
- 255. Issues, where to be tried.
- 256. Either party may give notice of trial. Note of issue. Stenographer.
- 257. Order of disposing of issues on the calendar.

§ 248. [203.] *The different kinds of issues.*

Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

- 1. Of law; and
- 2. Of fact.

§ 249. [204.] *Issue of law.*

An issue of law arises,

- 1. Upon a demurrer to the complaint, answer or reply, or to some part thereof.

§ 250. [205.] (Am'd 1849.) *Issue of fact.*

An issue of fact arises,

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer controverted by the reply; or,
3. Upon new matter in the reply, except an issue of law is joined thereon.

§ 251. [206.] *On issues of both law and fact, the issue of law to be first tried.*

Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct.

§ 252. [207.] (Am'd 1851, 1852.) *Trial defined.*

A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

§ 253. [208.] (Am'd 1849, 1852.) *Issues, how tried.*

An issue of law must be tried by the court, unless it be referred, as provided in sections two hundred and seventy and two hundred and seventy-one. An issue of fact (in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section two hundred and sixty-six, or a reference be ordered, as provided in sections two hundred and seventy and two hundred and seventy-one.

§ 254. [209.] (Am'd 1849.) *Other issues to be tried by the court.*

Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in sections two hundred and seventy and two hundred and seventy-one.

§ 255. [210.] (Am'd 1849, 1851, 1852.) *Issues, where to be tried.*

All issues of fact, triable by a jury or by the court, must be tried before a single judge. Issues of fact in the supreme court

must be tried at a circuit court when the trial is by jury, otherwise at a circuit court or special term, as the court may, by its rules, prescribe. Issues of law must be tried at a circuit court or special term, and shall, unless the court otherwise direct, have preference on the calendar.

§ 256. [211.] (Am'd 1858, 1859, 1860, 1863.) *Either party may give notice of trial. Note of issue. Stenographer.*

At any time after issue, and at least fourteen days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least eight days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue. *i.e. when last pleading is*

In the first judicial district there need be but one notice of trial, and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice.

In every action in which issue of fact is now joined, and the action is now placed upon the calendar of the supreme court of the first judicial district, or of the superior court of the city of New York, or of the court of common pleas for the city and county of New York, the party who shall have filed such note of issue shall, as a condition precedent to such action being brought to trial, pay to the clerk of the court the sum of three dollars; and in every action in either of the said courts commenced after the passage of this act, the party who shall file therein a first note of issue of fact shall, as a condition precedent to such filing, pay to the clerk of the court the sum of three dollars; and the amounts so received shall be accounted for and paid over, monthly, by the clerk of each of said courts, to the comptroller of the city of New York, and by him deposited in the county treasury, to be used as a fund for the payment of the salaries of stenographers employed in said courts, as provided for in this section. If the fund thus created be inadequate to pay such salaries, the additional amount necessary for such payment shall be appropriated and paid from the fund of county contingencies, to which fund any surplus of the

sums so paid over to the Comptroller, as hereinbefore provided, shall be credited.

Each of the courts hereinbefore named shall appoint a stenographer for the circuit, trial, term or special term, which constitutes a separate branch of such court, who shall be a sworn officer of the court, shall hold office during the pleasure of the court, and shall be paid a salary of fifteen hundred dollars per annum, in like manner as the salaries of other officers of the courts are now paid. It shall be the duty of every stenographer so appointed for any circuit, trial, term or special term, under the direction of the presiding judge thereof, to take full stenographic notes of all proceedings in every trial thereat; and in case the presiding judge shall require a transcript of said stenographic notes, he may order the expense thereof to be paid equally by the parties to the action, at the rate of ten cents for every one hundred words so transcribed, and may enforce payment thereof; and the amount so paid, together with the sum paid as a condition precedent to the cause being brought to trial, or to the first note of issue being filed as hereinbefore provided, shall be deemed a necessary disbursement within the meaning of section three hundred and eleven of the code of procedure, and shall be allowed as such to the prevailing party in the action.

At any extra circuit, trial, term or special term of said courts, the presiding judge thereof shall appoint a stenographer for such extra circuit or term, who shall, in like manner as aforesaid, be a sworn officer, and who shall be paid a compensation at the rate and in the manner hereinbefore provided.

When a court of oyer and terminer shall be held in and for the city and county of New York, the presiding judge thereof shall designate one of the stenographers of the supreme court to act as stenographer of such court of oyer and terminer during its session, who shall, in like manner as aforesaid, be a sworn officer, but who shall receive no compensation in addition to his salary as hereinbefore provided, except that in case a transcript of his stenographic notes, taken on the trial of any criminal cause, be required for the use of the presiding judge or the district attorney, the expense thereof shall, on the order of such judge or dis-

trict attorney, be paid as a county charge, at the rate hereinbefore specified.

In other counties of this State, on trials of issues of fact, at any circuit court, or court of oyer and terminer, it shall be lawful for the presiding justice, in his discretion, to employ a stenographer, who shall be entitled to such compensation as shall be certified by such justice, not exceeding five dollars for each day's attendance at such court at the request of such justice, which compensation shall be a charge upon the counties in which such courts shall be held respectively, and shall be audited, allowed and paid in like manner as other county charges are audited, allowed and paid. It shall be the duty of such stenographer to furnish to any party to such trials, upon request, a copy of the evidence and proceedings taken by him on such trials, or of such part thereof as may be required, on payment, on behalf of such party, of six cents for every one hundred words of the copy so furnished.

§ 257. [212.] *Order of disposing of issues on the calendar.*

The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury; *jury cases*
2. Issues of fact to be tried by the court; *bench*
3. Issues of law. *Demurrer*

CHAPTER III.

Trial by Jury.

- SECTION 258. Notice of trial. Separate trials.
259. Court to be furnished with a copy of the pleadings.
260. General and special verdicts defined.
261. When jury may render either general or special verdict, and when the court may direct a special finding.
262. On special finding with a general verdict, the former to control.
263. Jury to assess defendant's damages in certain cases.
264. Entry of the verdict. Motion for new trial.
265. Motion for new trial, or for judgment on special verdict, where to be heard.

§ 258. [213.] (Am'd 1851.) *Notice of trial. Separate trials.*

Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court, for good

cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

§ 259. [214.] (Am'd 1851.) *Court to be furnished with copy pleadings, &c.*

When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant.

§ 260. [215.] (Am'd 1849.) *General and special verdicts defined.*

A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

§ 261. [216.] (Am'd 1849.) *When jury may render either general or special verdict, and when court may direct special finding.*

In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property.

In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues;

and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

§ 262. [217.] *On special finding with general verdict, former to control.*

Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

§ 263. [218.] (Am'd 1851.) *Jury to assess defendant's damages in certain cases.*

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court give judgment for the plaintiff on the answer. If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

§ 264. [219.] (Am'd 1851, 1852.) *Entry of the verdict. Motion for new trial.*

(1) Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict. (2) If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled as provided by the rules of the court, and then stated in writing in a case, or separately, with so much of the evidence

as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. (3) If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court, or a judge thereof. (4) The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

§ 265. [220.] (Am'd 1851, 1852, 1857.) *Motion for new trial, &c., where to be heard.*

A motion for a new trial, on a case or exceptions, or otherwise, and an application for judgment on a special verdict or case reserved for argument or further consideration, must, in the first instance, be heard and decided at the circuit or special term, except that when exceptions are taken, the judge trying the cause may at the trial direct them to be heard in the first instance at the general term, and the judgment in the meantime suspended; and in that case they must be there heard in the first instance, and judgment there given. And when, upon a trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at the general term; and in that case, the application for judgment must be made at the general term. Every judgment rendered upon a verdict taken, subject to the opinion of the court at a general term, may be reviewed by the court of appeals in the same manner, and with the like effect, as if exceptions had been duly taken at the proper time; provided it shall appear by the return that questions of law were involved in the rendition of the judgment.

A motion for new trial made on verdict - an appeal from a judgment

CHAPTER IV.

Trial by the Court.

- SECTION 266. Trial by jury, how waived.
 267. On trial by the court, judgment, how given.
 268. Exceptions, how and when taken. Judgment at general term.
 269. Proceedings upon judgment on issue of law.

§ 266. [221.] (Am'd 1849.) *Trial by jury, how waived.*

Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and, with the assent of the court, in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

§ 267. [222.] (Am'd 1849, 1860.) *On trial by the court, judgment, how to be given.*

Upon a trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly.

§ 268. [223.] (Am'd 1851, 1852, 1860.) *Exceptions, how and when taken. Judgment at general term.*

[1.] For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury.

[2.] And either party desiring a review, upon the evidence appearing on the trial, either of the questions of fact or of law may, at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except

that the judge, in settling the case, must briefly specify the facts found by him, and his conclusions of law.

[3.] But the questions, whether of fact or of law, arising upon the trial, can only be reviewed in the manner prescribed by this section; the questions of law in every stage of the appeal, and the questions of fact upon the appeal to the general term of the same court, as prescribed in section 348.

No finding of facts by the general term shall be required for the purpose of review in the court of appeals; and if the judgment be reversed at the general term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and in that case, the question, whether the judgment should have been reversed either upon questions of fact or of law, shall be open to review in the court of appeals.

The provisions of this section, and also of section two hundred and seventy-two, as they are hereby amended, shall apply to appeals now pending, as well as to those hereafter brought.

§ 269. [224.] (Am'd 1849, 1851.) *Proceedings upon judgment on issue of law.*

On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two subdivisions of section 246, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as in that section provided.

CHAPTER V.

Trial by Referees.

- SECTION 270. All issues referable by consent.
- 271. When a reference may be compulsorily ordered.
- 272. Mode of trial. Effect of report. Review.
- 273. Referees, how chosen.

§ 270. [225.] *All issues referable by consent.*

All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties.

§ 271. [226.] (Am'd 1849.) *When reference may be compulsorily ordered.*

Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect; or,

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

§ 272. [227.] Am'd 1851, 1852, 1857, 1859, 1860.) *Mode of trial. Effect of report. Review.*

The trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the court. They shall have the same power to grant adjournments, and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with the like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance or refusal to be sworn or testify, as is possessed by the court. They must state the facts found and the conclusions of law separately; and their decision must be given, and may be excepted to and reviewed in like manner, but and with like effect in all respects as in cases of appeal under section 268; and they may in like manner settle a case of exceptions. The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

When the case on appeal shall have been heard and decided at the general term, upon the report of the referee and exceptions,

without a case containing the evidence, the decision may be reviewed in like manner on appeal to the court of appeals. If the judgment be reversed at the general term, and a new trial ordered, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and in that case the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review in the court of appeals.

§ 273. [228.] (Am'd 1849, 1851, 1862, 1863.) *Referees, how chosen.*

In all cases of reference, the parties as to whom issues are formed in the action (except when the defendant is an infant or an absentee), may agree in writing upon a person or persons not exceeding three, and a reference shall be ordered to him or them, and to no other persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object, except in actions for divorce. And no justice or judge of any court shall sit as referee in any action pending in the court of which he is judge, and not already referred. Unless the court shall otherwise order, or the parties otherwise stipulate, the referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted; and in default thereof, said referee or referees shall not be entitled to receive any fees, and the action shall proceed as if no reference had been ordered.

CHAPTER VI.

Manner of Entering Judgment.

- SECTION 274. Judgment may be for or against any of the parties to the action; may grant defendant affirmative relief. Complaint may be dismissed for neglect to prosecute the action. Judgment against married woman.
275. The relief to be awarded to the plaintiff.
276. Rate of damages where damages are recoverable.
277. Judgment in action for recovery of personal property.
278. Judgment, how directed.
279. Clerk to keep a judgment-book.
280. Judgment to be entered in judgment-book.
281. Judgment-roll.
282. Judgments, how and when to be docketed.

§ 274. [230.] (Am'd 1849, 1852, 1862.) *Judgment may be for or against any of the parties; may grant defendant affirmative relief. Complaint may be dismissed for neglect to prosecute action. Judgment against married woman.*

(1.) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

(2.) And it may grant to the defendant any affirmative relief to which he may be entitled.

(3.) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

(4.) The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

In an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate and not otherwise. And in any proceeding to enforce such judgment,

the supreme court shall have jurisdiction, though the amount be less than one hundred dollars.

§ 275. [231.] *The relief to be awarded to the plaintiff.*

The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

§ 276. [232.] *Rate of damages where damages are recoverable.*

Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action.

§ 277. *Judgment in action for recovery of personal property.*

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

§ 278. [233.] (Am'd 1849, 1851, 1852.) *Judgment, how directed.*

Judgment upon an issue of law or of fact, or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same by the first subdivision of section 246, and by section 384, and except where it may be given at the general term as provided in section 265), shall in the first instance be entered upon the direction of a single judge, or report of referees, subject to review at the general term, on the demand of either party, as herein provided.

§ 279. [234.] *Clerk to keep a Judgment-book.*

The clerk shall keep, among the records of the court, a book for the entry of judgments, to be called the "judgment-book."

§ 280. [235.] *Judgment to be entered in Judgment-book.*

The judgment shall be entered in the judgment-book, and shall specify clearly the relief granted, or other determination of the action.

§ 281. [236.] (Am'd 1849, 1851, 1852.) *Judgment-roll.*

Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering the judgment, shall attach together, and file the following papers, which shall constitute the judgment-roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment.

§ 282. [237.] (Am'd 1851.) *Judgments, when and how to be docketed.*

On filing a judgment-roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the county where it was rendered, and in any other county upon the filing with the clerk thereof a transcript of the original "docket," and shall be a lien on the real property, in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof in the county in which such real estate is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered. But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the Code, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, in such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment,

that the same is "secured on appeal;" and thereupon it shall cease, during the pending of the appeal, to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith.

TITLE IX.

Of the Execution of the Judgment in Civil Actions.

CHAPTER I. The execution.

II. Proceedings supplementary to the execution.

CHAPTER I.

The Execution.

SECTION 283. Execution within five years of course.

284. Execution can only be issued by leave of court after five years.

Leave, how obtained.

285. Judgments, how enforced.

286. The different kinds of execution.

287. To what counties execution may be issued. Execution against a married woman.

288. Execution against the person, in what cases.

289. Form of the execution.

290. Execution to be returnable in sixty days.

291. Existing laws relating to execution continued.

§ 283. [238.] (Am'd 1849.) *Execution within five years of course.*

Writs of execution for the enforcement of judgments, as now used, are modified in conformity to this title, and the party, in whose favor judgment has been heretofore or shall hereafter be given may, at any time within five years after the entry of judgment, proceed to enforce the same as prescribed by this title.

§ 284. [239.] (Am'd 1849, 1851, 1858.) *After five years, to be issued only by leave of court. Leave, how obtained.*

After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which

case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part.

When judgment shall have been rendered in a court of justice of the peace, or in a justice's or other inferior court in a city, and docketed in the office of the clerk of the county, the application for leave to issue execution must be to the county court of the county where the judgment was rendered, or in the city and county of New York to the court of common pleas of that city and county.

§ 285. [240.] (Am'd 1849.) *Judgments, how enforced.*

Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt.

§ 286. [241.] (Am'd 1849.) *The different kinds of execution.*

There shall be three kinds of execution; one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, but they need not be sealed nor subscribed, except as prescribed in section 289.

§ 287. [242.] (Am'd 1851, 1852, 1862.) *To what counties execution may be issued. Execution against a married woman.*

When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where judgment is docketed. When it requires the delivery of real or per-

sonal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county, or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

§ 288. [243.] (Am'd 1849, 1862.) *Execution against the person, in what cases.*

If the action be one in which the defendant might have been arrested, as provided in section 179 and section 181, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179.

§ 289. [244.] (Am'd 1849.) *Form of the execution.*

The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the party issuing it, or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment-roll or transcript is filed, the names of the parties, the amount of judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment-debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor; and if sufficient personal property

cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, or tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the person of the judgment-debtor, it shall require the officer to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

§ 290. [245.] (Am'd 1849.) *To be returnable in sixty days.*

The execution shall be returnable within sixty days, after its receipt by the officer, to the clerk with whom the record of judgment is filed.

§ 291. [246.] (Am'd 1849, 1851.) *Existing laws relating to execution continued, until otherwise provided.*

Until otherwise provided by the legislature, the existing provisions of law, not in conflict with this chapter, relating to executions and their incidents, the property liable to sale on execution, the sale and redemption thereof, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

CHAPTER II.

Proceedings Supplementary to the Execution.

SECTION 292. Order for discovery of property, examination of judgment debtor, &c.

- 293. Any debtor to execution debtor may pay his debt to sheriff.
- 294. Examination of debtors of judgment debtor, or of those having property belonging to him.
- 295. Witnesses required to testify.
- 296. Compelling party or witnesses to attend.
- 297. What property may be ordered to be applied to the execution.
- 298. Judge may appoint receiver, and prohibit transfer of property.
- 299. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.
- 300. Reference by Judge.
- 301. Costs of proceeding.
- 302. Disobedience of order, how punished.

§ 292. [247.] (Am'd 1849, 1851, 1858, 1859, 1863.) *Existing suits. Order for Discovery of Property, Examination of Judgment Debtor, &c.*

(1.) When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or, if he do not reside in the State, to the sheriff of the county where a judgment-roll, or a transcript of a justice's judgment for twenty-five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution was issued to such city and county, requiring such judgment debtor to appear and answer concerning his property, before such judge, at a time and place specified in the order, within the county to which the execution was issued. (2.) After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the court, or a judge thereof, or county judge, or any judge of the court of common pleas for the city and county of New York, that any judgment debtor, residing in the county where such judge or officer resides, has prop-

erty which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution. Whenever it shall satisfactorily appear, by affidavit, to a justice of the supreme court, that such county judge, or judge of said court of common pleas, is incapacitated from acting in any of the proceedings whatever herein authorized, from any cause or causes whatsoever, such justice of the supreme court shall have the same powers and authority, in all cases whatever, as are herein conferred upon him as to cases of judgments in the supreme court. (3.) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness. (4.) Instead of the order requiring the attendance of the judgment debtor, the judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the State, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and, if it then appears that there is danger of the debtor's leaving the State, and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge, as for a contempt. (5.) No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question, on

the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

§ 293. [248.] (Am'd 1849.) *Existing suits—Any debtor may pay execution against his creditor.*

After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

§ 294. [249.] (Am'd 1849, 1863.) *Existing suits—Examination of debtors of judgment debtor, or of those having property belonging to him.*

After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

The proceedings mentioned in this section, and in section two hundred and ninety-two, may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions now pending, and not actually terminated by any final judgment or decree.

§ 295. [250.] *Existing suits—Witnesses required to testify.*

Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

§ 296. [251.] (Am'd 1849.) *Existing suits—Compelling party or witnesses to attend.*

The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

§ 297. [252.] (Am'd 1851.) *Existing suits—What property may be ordered to be applied to the execution.*

The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

§ 298. [253.] (Am'd 1849, 1851, 1862, 1863.) *Existing suits—Judge may appoint receiver and prohibit transfer, &c., of property.*

The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to section 244. But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one re-

ceiver of the property of a judgment debtor shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith.

Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the county where the judgment-roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his office, to be called "Book of orders appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded; or if the judgment is upon a transcript from justice's court, filed in county clerk's office, then he shall be subject to the direction and control of the county court.

But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the clerk of the county in which such judgment debtor resides.

§ 299. [254.] (Am'd 1849.) *Existing suits—Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.*

If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the

action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

§ 300. [255.] (Am'd 1849, 1857.) *Existing suits—Reference by judge.*

The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

§ 301. [256.] (Am'd 1849.) *Existing suits—Costs of proceeding.*

The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

§ 302. [257.] (Am'd 1849, 1851.) *Existing suits—Disobedience of order, how punished.*

If any person, party, or witness, disobey an order of the judge or referee, duly served, such person, party, or witness, may be punished by the judge as for a contempt. And in all cases of commitment under this chapter, or the act to abolish imprisonment for debt, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

*The old action in § 51 a creditor's
Bill may still be brought.*

TITLE X.

Of the Costs in Civil Actions.

- SECTION 303. Existing statutes regulating costs repealed.
304. Costs, when allowed of course to the plaintiff.
305. Costs, when allowed of course to the defendant.
306. Costs, when allowed to either party, in the discretion of the court.
307. Amount of costs allowed.
308. Allowance in addition to costs.
309. Allowance, how computed. Difficult and extraordinary cases.
310. Interest on verdict or report, when allowed.
311. Costs, how to be inserted in judgment. Adjustment of interlocutory costs.
312. Clerk's fees.
313. Referee's fees.
314. Costs on postponement of trial.
315. Costs on a motion.
316. Costs against an infant plaintiff.
317. Costs in an action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue. Security for costs.
318. Costs on review of a decision of an inferior court in a special proceeding.
319. Costs in actions by the people.
320. The like.
321. Costs against assignee after action brought, of cause of action.
322. Costs on a settlement.

§ 303. [258.] *Fee bill abolished.*

All statutes establishing or regulating the costs or fees of attorneys, solicitors, and counsel in civil actions, and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are in this act termed costs.

§ 304. [259.] (Am'd 1849, 1862.) *When allowed of course to the plaintiff.*

Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a

claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial;

2. In an action to recover the possession of personal property;

3. In the actions of which a court of justice of the peace has no jurisdiction; § 54.

4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars; but in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages. And in action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which, with the damages, amounts to fifty dollars, or the possession of property be adjudged to him, the value of which, with the damages, amounts to fifty dollars; such value must be determined by the jury, court, or referee, by whom the action is tried. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case, for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided that the party or parties proceeded against in such other action or actions have been within this State, and not secreted.

§ 305. [260.] *When allowed to defendant.*

Costs shall be allowed of course to the defendant, in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein.

§ 306. [261.] (Am'd 1849, 1851.) *When allowed to either party, in the discretion of the court.*

In other actions, costs may be allowed or not, in the discretion of the court.

In all actions where there are several defendants not united in

interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them.

In the following cases the costs of an appeal shall be in the discretion of the court:

1. When a new trial shall be ordered;
2. When a judgment shall be affirmed in part, and reversed in part.

§ 307. [262.] (Am'd 1849, 1851, 1852, 1857, 1858, 1859, 1862, 1863, 1864.) *Amount of costs allowed.*

When allowed, costs shall be as follows:

1. For all proceedings before trial, including actions where judgment on failure to answer can only be taken on application to the court, twenty-five dollars; where judgment may be taken upon failure to answer without application to the court, ten dollars; for each additional defendant served with process, not exceeding ten, two dollars; and for each necessary defendant in excess of that number served with process, one dollar.

2. To the defendant for all proceedings before notice of trial, ten dollars, and for all proceedings after notice of and before trial, fifteen dollars.

3. To either party, where a new trial shall be had, for all proceedings before such new trial and after the granting of such new trial, twenty-five dollars; for attending upon and taking the deposition of a witness conditionally, or attending to perpetuate his testimony, ten dollars; for drawing interrogatories to annex to a commission for the taking of testimony, ten dollars; for attending the examination of a party before trial, ten dollars; for making and serving a case, or case containing exceptions, twenty dollars, except that where the case shall necessarily contain more than fifty folios, there shall be allowed ten dollars, in addition thereto, and for making and serving amendments thereto, ten dollars.

4. To either party for the trial of an issue of law, twenty dollars; for every trial of an issue of fact, thirty dollars; and where the trial shall necessarily occupy more than two days, ten dollars in addition thereto.

5. To either party on appeal, except to the Court of Appeals, and except appeals in the cases mentioned in section three hundred and forty-nine, before argument, twenty dollars; for argument, forty dollars; and the same costs shall be allowed to either party before argument, and for argument on application for judgment upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial, on a case made, and in cases where exceptions are ordered to be heard in the first instance, at a General Term, under the provisions of section two hundred and sixty-five.

6. To either party on appeal to the Court of Appeals, before argument, thirty dollars; for argument, sixty dollars; and where a judgment is affirmed, the court may, in its discretion, also award damages for the delay, not exceeding ten per cent. on the amount of the judgment; for preparing and serving a case, or case containing exceptions, in appeals to the Court of Appeals, twenty dollars.

7. To either party, for every circuit or term not exceeding five circuits, and five special and five general terms, at which the cause is necessarily on the calendar, and is not tried, or is postponed by order of the court, ten dollars; but in an action hereafter brought to recover dower, before admeasurement, of real property aliened by the husband, the plaintiff shall not recover costs, unless it appear that the dower was demanded before the commencement of the action, and was refused. The same costs shall be allowed to the plaintiff in proceedings under chapter two, title twelve, of the second part of this Code (sections three hundred and seventy-five to three hundred and eighty-one), as upon the commencement of an action.

§ 308. [263.] (Am'd 1849, 1857, 1862.) *Additional allowance.*

In addition to these allowances, there shall be allowed to the plaintiff, upon the recovery of judgment by him, in any action for the partition of real property, or for the foreclosure of a mortgage, or in any action in which a warrant of attachment has been issued, or for an adjudication upon a will or other instrument in writing, and in proceedings to compel the determination of claims to real property, the sum of ten per cent. on the recovery, as in the next section prescribed, for any amount not exceeding two hundred

dollars; an additional sum of five per cent. for any additional amount not exceeding four hundred dollars; and an additional sum of two per cent. for any additional amount not exceeding one thousand dollars.

And in the actions above named, if the same shall be settled before judgment therein, like allowances upon the amount paid or secured upon such settlement, at one-half the rates above specified.

§ 309. [264.] (Am'd 1849, 1857, 1858, 1859, 1862.) *Allowance, how computed. Difficult and extraordinary cases.*

These rates shall be estimated upon the value of the property claimed or attached, or affected by the adjudication upon the will or other instrument, or sought to be partitioned, or the amount found due upon the mortgage in an action for foreclosure. And whenever it shall be necessary to apply to the court for an order enforcing the payment of an installment falling due after judgment in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last section prescribed, but to no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered. Such amount of value must be determined by the court, or by the commissioners in case of actual partition. In difficult and extraordinary cases, where a trial has been had, except in any of the actions or proceedings (other than those for the partition of real estate) specified in section three hundred and eight, and in actions or proceedings for the partition of real estate, the court may also, in its discretion, make a further allowance to any party not exceeding five per cent. upon the amount of the recovery or claim, or subject matter involved.

§ 310. [265.] *Interest on verdict or report, when allowed.*

When the judgment is for the recovery of money, interest, from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

§ 311. [266.] (Am'd 1849, 1857, 1862.) *Costs, how to be inserted in judgment. Adjustment of interlocutory costs.*

The clerk shall insert in the entry of judgment, on the applica-

tion of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village, or town, and then upon two days' notice, the sum of the allowances for costs, as provided by this Code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing when required by a rule of the court. The disbursements shall be stated in detail and verified by affidavit. A copy of the items of the costs and disbursements shall be served, with a notice of adjustment.

Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceedings, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct.

§ 312. [267.] *Clerk's fees.*

The clerk shall receive,

On every trial, from the party bringing it on, one dollar; on entering a judgment by filing transcript, six cents;

On entering judgment, fifty cents; except in courts where the clerks are salaried officers, and in such courts, one dollar.

He shall receive no other fee for any services whatever, in a civil action, except for copies of papers, at the rate of five cents for every hundred words.

§ 313. [268.] *Referees' fees.*

The fees of referees shall be three dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation.

§ 314. [269.] *Costs on postponement of trial.*

When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponement.

§ 315. [270.] (Am'd 1849, 1857.) *Existing suits—Costs on a motion.*

Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action.

§ 316. *Costs against infant plaintiff.*

When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor, and payment thereof may be enforced by attachment.

§ 317. (Am'd 1851, 1852.) *Costs in action by or against an executor or administrator, trustees of an express trust, or a person expressly authorized by statute to sue. Security for costs.*

(1.) In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors or administrators where they are now exempted therefrom by section 41 of title 3, chapter 6, of the second part of the Revised Statutes.

(2.) And whenever any claim against a deceased person shall be referred, pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. (3.) And the court may, in its discretion, in the cases mentioned in this section, require the plaintiff to give security for costs.

§ 318. (Am'd 1862.) *Costs on review of a decision of an inferior court in a special proceeding.*

When the decision of a court of inferior jurisdiction in a special proceeding, including appeals from surrogates' courts, shall be brought before the supreme court for review, such proceedings

shall, for all purposes of cost, be deemed an action at issue, on a question of law, from the time the same shall be brought into the supreme court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case.

§ 319. *Costs in action by the people.*

In all civil actions, prosecuted in the name of the people of this State, by an officer duly authorized for that purpose, the people shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the people as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the people till after execution issued therefor against such private party and returned unsatisfied.

§ 320. *Costs in actions by the people.*

In an action prosecuted in the name of the people of this State, for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the people.

§ 321. *Costs against assignee after action brought of cause of action.*

In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment.

§ 322. *Costs on a settlement.*

Upon the settlement, before judgment, of any action mentioned in section three hundred and four, no greater sum shall be demanded from the defendant as costs than at the rates prescribed by that section.

TITLE XI.

Of Appeals in Civil Actions.

CHAPTER I. Appeals in general.

- II. Appeals to the court of appeals.
- III. Appeals to the supreme court from an inferior court.
- IV. Appeals in the supreme court and the superior court, and the court of common pleas in the city of New York, from a single judge to the general term.
- V. Appeal to the court of common pleas for the city and county of New York, or to a county court from an inferior court.

CHAPTER I.

Appeals in General.

SECTION 323. Writs of error abolished, and appeals substituted.

- 324. Orders made out of court, how vacated or modified.
- 325. Who may appeal.
- 326. Parties, how designated on appeal.
- 327. Appeal, how made.
- 328. Clerk to transmit papers to appellate court.
- 329. Intermediate orders affecting the judgment may be reviewed on the appeal from the judgment.
- 330. Judgment on appeal.
- 331. Time for appealing.
- 332. The like.

§ 323. [271.] *Existing Suits—Writs of error abolished, and appeals substituted.*

Writs of error in civil actions, as they have heretofore existed, are abolished; and the only mode of reviewing a judgment, or order, in a civil action, shall be that prescribed by this title.

§ 324. [272.] *Existing Suits—Orders made out of court, how vacated or modified.*

An order, made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

§ 325. [273.] *Existing suits—Who may appeal.*

Any party aggrieved may appeal in the cases prescribed in this title.

§ 326. [274.] *Existing Suits—Parties, how designated on appeal.*

The party appealing shall be known as the appellant, and the adverse party as the respondent. But the title of the action shall not be changed in consequence of the appeal.

§ 327. [275.] (Am'd 1849.) *Existing Suits—Appeal, how made.*

(1.) An appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof. (2.) When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just.

§ 328. [276.] (Am'd 1858, 1863.) *Existing Suits—Transmission of papers to appellate court.*

If the appellant shall not, within twenty days after his appeal is perfected, cause a certified copy of the notice of appeal and of the judgment-roll, or, if the appeal be from an order or any part thereof, a certified copy of such order and the papers upon which the order was granted, to be transmitted to the appellate court by the clerk with whom the notice of appeal is filed, the respondent may cause such certified copy to be transmitted by such clerk to the appellate court, and recover the expenses thereof as a disbursement on such appeal in case the judgment or order appealed from shall be in whole or in part affirmed; and this provision shall apply to all appeals heretofore taken, where the appeal has not been dismissed in the manner provided by the rules of the appellate court.

§ 329. [277.] *Existing Suits—Intermediate orders affecting the judgment may be reviewed on the appeal.*

Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

§ 330. [278.] (Am'd 1849.) *Existing Suits—Judgment on appeal.*

Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed

from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

§ 331. [279.] (Am'd 1857, 1858.) *Existing suits — Time for appealing.*

The appeal to the court of appeals, under subdivision 2 of section 11 of this Code, must be taken within sixty days after written notice of the order shall have been given to the party appealing; every other appeal allowed by the second and third chapters of this title must be taken within two years after the judgment shall be perfected by filing the judgment-roll.

§ 332. [280.] (Am'd 1849.) *Other appeals within thirty days.*

The appeal allowed by the fourth chapter of this title must be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing.

CHAPTER II.

Appeals to the Court of Appeals.

- SECTION 333. Appeal, in what cases.
- 334. On appeal, security must be given or deposit made, unless waived.
 - 335. On judgment for money, security to stay execution. New undertaking in sureties on first becoming insolvent.
 - 336. If judgment be to deliver document or personal property, it must be deposited or security be given.
 - 337. If judgment be to execute conveyance, it must be executed and deposited.
 - 338. Security where judgment is to deliver real property or for a sale of mortgaged premises.
 - 339. Stay of proceedings upon security being given.
 - 340. Undertakings may be in one instrument or several.
 - 341. Security to be approved and sureties to justify.
 - 342. Perishable property may be sold, notwithstanding appeal.
 - 343. Undertaking must be filed.

§ 333. [282.] (Am'd 1857.) *Existing suits—Appeal, in what cases.*

An appeal may be taken to the court of appeals in the cases mentioned in section 11. When any of the courts mentioned

therein shall, at general term, render judgment upon a verdict taken subject to the opinion of the court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be prepared by and under the direction of the court, and shall be filed with the judgment-roll, and be deemed a part thereof, for the purposes of a review in the court of appeals.

The provisions of the last preceding section [this] shall apply to any judgment therein mentioned that has been heretofore rendered, and upon which an appeal has been brought and is now pending, or upon which an appeal shall hereafter be brought. When the return has already been filed with the clerk of the court of appeals, such statement shall be filed with him, and be deemed a part of such return.

§ 334. [283.] *On appeal, security must be given or deposit made, unless waived.*

To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

§ 335. [284.] (Am'd 1859, 1862, 1863.) *Existing suits—On judgment for money, security to stay execution. New undertaking on sureties in first becoming insolvent.*

If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect that, if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. When-

ever it shall be made satisfactorily to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file, and serve a new undertaking as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking, with surety or sureties, he may, in lieu thereof, deposit with the officer or into court, as the case may require, money to the amount for which such bond or undertaking is to be given. The court in which such action or proceeding is pending may direct what disposition shall be made of such money, pending the action or proceeding. In any case where, by this section, the money is to be deposited with an officer, a judge of the court, at special term or at chambers, upon the application of either party, may, before such deposit is made, order it to be deposited in court instead of with such officer; and a deposit made, pursuant to such order, shall be of the same effect as if made with such officer.

§ 336. [235.] (Am'd. 1849.) *Existing suits—If judgment be to deliver document or personal property, it must be deposited, or security be given.*

If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, or county judge, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

§ 337. [286.] *Existing suits — If to execute conveyance, it must be executed and deposited.*

If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not

be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

§ 338. [287.] *Existing suits — Security where judgment is to deliver real property or for a sale of mortgaged premises.*

If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

§ 339. [288.] (Am'd 1849, 1851.) *Existing suits—Stay of proceedings upon security being given.*

Whenever an appeal is perfected as provided by sections 335, 336, 337, and 338, it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by sections three hundred and thirty-five, three hundred and thirty-six, and three hundred and thirty-eight, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in sections three hundred and thirty-six, three hundred and thirty-seven, three hundred and thirty-eight, where it would otherwise, according to those sections, exceed that sum.

§ 340. [289.] (Am'd 1849.) *Existing suits — Undertakings may be in one instrument or several.*

The undertakings prescribed by sections 334, 335, 336, and 338, may be in one instrument or several, at the option of the appellant; and a copy, including the names and residence of the sureties, must be served on the adverse party, with the notice of appeal, unless a deposit is made as provided in section 334, and notice thereof given.

§ 341. [290.] (Am'd 1849.) *Existing suits — Security to be approved and to justify.*

An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after the notice of the appeal; and unless they or other sureties justify before a judge of the court below, or a county judge, as prescribed by sections 195 and 196, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

§ 342. [291.] (Am'd 1849.) *Existing suits—Perishable property may be sold notwithstanding appeal.*

In the cases not provided for in sections 335, 336, 337, 338, and 339, the perfecting of an appeal, by giving the undertaking mentioned in section 334, shall stay proceedings in the court below upon the judgment appealed from, except that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

§ 343. [292.] *Existing suits—Undertaking must be filed.*

The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered.

CHAPTER III.

Appeal to the Supreme Court from an inferior Court.

SECTION 344. Appeal, in what cases.

345. Security must be given as upon appeal to court of appeals.

346. Appeals, where heard.

347. Judgment on appeal, where entered and docketed.

§ 344. [293.] (Am'd 1849, 1858, 1860.) *Existing suits—Appeal, in what cases.*

An appeal may be taken to the supreme court from the judgment rendered by a county court, or by the mayor's courts or the recorders' courts of cities.

An appeal also may be taken to the supreme court from any order affecting a substantial right, made by a county court or a county judge, in any action or proceeding; and such appeal shall be heard on a copy of the papers on which the order appealed from was made.

§ 345. [294.] *Existing suits—Security must be given as upon appeal to court of appeals.*

Security must be given upon such appeal, in the same manner, and to the same extent, as upon an appeal to the court of appeals.

§ 346. [295.] *Existing suits—Appeals, where heard.*

Appeals in the supreme court shall be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county, except that where the judgment or order was entered in the city and county of New York, the appeal shall be heard in the first district.

§ 347. [296.] (Am'd 1849.) *Existing suits—Judgment on appeal, where entered and docketed.*

Judgment upon the appeal shall be entered and docketed with the clerk in whose office the judgment-roll is filed. When the appeal is heard in a county other than that where the judgment-roll is filed, or is not from a judgment of a county court, the judgment

upon the appeal shall be certified to the clerk with whom the roll is filed, to be there entered and docketed.

CHAPTER IV.

Appeals in the Supreme Court, and the Superior Court and Court of Common Pleas of the City of New York, from a single Judge to the General Term.

SECTION 348. Appeals from circuit and special term to same court in general term. Security on appeals. Action on undertaking.

349. Appeals from orders at special term.

350. Appeals from orders at chambers.

§ 348. [297.] (Am'd 1849, 1851, 1852, 1859, 1862.) *Appeals from circuit and special term to same court in general term. Security on appeal. Action on undertaking.*

In the supreme court, the superior court of the city of New York, and the court of common pleas for the city and county of New York, an appeal upon the law may be taken to the general term from a judgment entered upon the report of referees or the direction of a single judge of the same court, in all cases, and upon the fact when the trial is by the court ~~of~~ referees. Such an appeal, however, does not stay the proceedings, unless security be given as upon an appeal to the court of appeals, and such security be renewed as in cases required by section 335 on motion to the court at special term, or unless the court, or a judge thereof, so order, which order may be made upon such terms, as to security, or otherwise, as may be just, such security not to exceed the amount required on an appeal to the court of appeals. In the supreme court, the appeal must be heard in the same manner as if it were an appeal from an inferior court.

No action shall be commenced upon any undertaking given or to be given in pursuance with the provisions of this section, until ten days after the service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from. And in case an appeal has been or shall be taken to the court of appeals from such order or judgment of affirmance, and security given according to law so as to stay the issuing of exe-

cution, no action shall be commenced or recovery had upon any undertaking given or to be given in pursuance of the provisions of this section until after the final determination of such appeal.

§ 349. [299.] (Am'd 1849, 1851, 1852, 1862.) *Appeals from orders at special term.*

An appeal may, in like manner, and within the same time, be taken from an order made at a special term by a single judge of the same court or county, or a special county judge, or by a recorder, or by any recorder's court of any city, in any stage of the action, including proceedings supplementary to the execution, and may be thereupon reviewed in the following cases.

1. When the order grants or refuses, continues or modifies, a provisional remedy.
2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer.
3. When it involves the merits of the action, or some part thereof, or affects a substantial right.
4. When the order in effect determines the action and prevents a judgment from which an appeal may be taken.
5. When the order is made upon a summary application, in an action after judgment, and affects a substantial right.

§ 350. [300.] *Appeals from orders at chambers.*

The last section shall include an order made out of court upon notice, but in such case the order must be first entered with the clerk. And for the purpose of an appeal, any party affected by such order may require it to be entered with the clerk, and it shall be entered accordingly.

CHAPTER V.

Appeal to the Court of Common Pleas for the City and County of New York, or to a County Court, from an Inferior Court.

- SECTION 351. Existing laws repealed, and this chapter substituted.
 352. By what courts judgments to be reviewed. *New trial.*
 353. Appeal, when to be taken.
 354. Notice of appeal to be served on justice, and costs of return to be paid.
 355. Security to stay execution.
 356. Form of undertaking.
 357. Execution, how stayed.
 358. In case of death of justice, undertaking to be filed.
 359. Filing in lieu of service of notice of appeal.
 360. Return, when and how made and compelled.
 361. How made if justice be out of office.
 362. Further return.
 363. Justice dead, insane or absent.
 364. Hearing upon return. Dismissing appeal if not brought on.
 365. Appeal to be heard on the original papers.
 366. Judgment on appeal. *New trial.*
 367. Judgment-roll.
 368. Costs, how awarded.
 369. Restitution.
 370. Setting off costs and recovery.
 371. The costs on appeal.

§ 351. [301.] (Am'd 1849.) *Existing suits—Existing laws repealed, and this chapter substituted.*

All statutes, now in force, providing for the review of judgments in civil cases, rendered by courts of justices of the peace, by the marine court of the city of New York, by the justices' courts in the city of New York, by the municipal court of the city of Brooklyn, and by the justices' courts of cities, and regulating the practice in relation to such review, are repealed; and hereafter, the only mode of reviewing such judgments shall be an appeal, as prescribed by this chapter.

§ 352. [302.] (Am'd 1849, 1857, 1862, 1863, 1864.) *Existing suits—By what courts judgments to be reviewed. New trial.*

When a judgment shall have been rendered by the general term of the marine court of the city of New York, or by a justice of a justices' court of that city, the appeal shall be to the court of common pleas for the city and county of New York.

The appeal from the general term of the marine court pre-

scribed herein, shall be from an actual determination at such general term only, and shall be taken within twenty days after judgment by such general term. In the city of Buffalo, the appeals from the courts of justices of said city shall be to the superior court of said city. When rendered by any of the other courts enumerated in section three hundred and fifty-one, the appeal shall be to the county court of the county where the judgment was rendered. On such appeal, when the amount of the claim or claims of either party litigated in the court below shall exceed fifty dollars, or when in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed fifty dollars, exclusive of costs, a new trial shall be had in the county court in the following cases:

1. When the judgment was rendered upon an issue of law joined between the parties.

2. When it was rendered upon an issue of fact joined between the parties, whether the defendant was present at the trial or not. And when the appeal is to the superior court of Buffalo, in the cases in which, by the terms of this section, a new trial may be had, such new trial shall be had in the said superior court.

Provided, however, that the appellant may, in cases when the amount litigated exceeds fifty dollars, state in the notice of appeal that such appeal is taken upon questions of law only, in which case a new trial shall not be had in county court, but the appeal shall be heard and determined in the same manner as if the amount litigated in justices' court in said cause appealed was fifty dollars or under.

§ 353. [303.] (Am'd 1851, 1852.) *Existing suits—Appeal, when to be taken.*

The appellant shall, within twenty days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have twenty days, after personal notice of the judgment, to serve the notice of appeal provided for in this and the next section.

§ 354. [304.] (Am'd 1849, 1851, 1852, 1857, 1858.) *Existing suits—Notice of appeal to be served on justice, and costs of return to be paid.*

The notice of appeal must, within the same time, be served on the justice personally, if living and within the county, or on his clerk, if there be one, and on the respondent, personally, or by leaving it at his residence, with some person of suitable age and discretion; or, in case the respondent is not a resident of such county, or cannot, after due diligence, be found therein, in the same manner, on the attorney or agent, if any, who is a resident of such county, who appeared for the respondent on the trial; and if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent by leaving it with the clerk of the appellate court; and the appellant must, at the time of the service of the notice of appeal on the justice or on his clerk, as herein provided (except in cases of appeals from the district courts in the city of New York and the general term of the marine court of the city of New York), pay to such justice or clerk the costs of the action, included in the judgment, together with two dollars, costs of the return, which shall be included in the judgments for costs on reversal. In all cases of appeal from the general term of the marine court of the city of New York, and from the district courts of the city of New York, to the court of common pleas for the city and county of New York, the appellant shall, at the time of the service of the notice of appeal, pay to the clerk of the marine court, or to the justice or clerk of the district court, two dollars, as costs of the return to such court of common pleas, which costs, so paid, shall be included in the judgment for costs, in case the judgment of the court below shall be reversed; and the appellant shall also execute, on the appeal, a written undertaking on his part, with one or more sufficient sureties, to the effect that the appellant will pay all costs, disbursements, and extra costs, awarded against him in the court below, if such judgment shall be affirmed by the appellate court, on such appeal, together with all costs and damages which may be awarded against him thereon; such sureties to justify in double the amount specified in the undertaking; such undertaking and the sufficiency of the sureties to be approved by the justice of the

court below, or one of the judges of the court of common pleas; or the appellant may deposit, with the clerk of the court of common pleas, the costs, disbursements, and extra costs, included in the judgment in the court below, and the sum of fifteen dollars, to meet any costs that may be awarded against him on such appeal; and such appeal from the general term of the marine court and the district court shall be ineffectual, unless, within the time specified for bringing the appeal, the appellant execute such undertaking or make such deposit; the undertaking, when executed and approved, to be filed with the clerk of the court of common pleas; the amount so deposited shall be repaid by said clerk to the appellant, if he succeed on the appeal; and in case the judgment be affirmed, the said clerk shall, after execution is issued, pay over the amount, so deposited, to the respondent, which shall be credited on the execution issued on the judgment of affirmance, to the extent thereof, and the balance, if any, on the execution issued on the judgment appealed from.

§ 355. [305.] (Am'd 1849, 1863.) *Existing suits—Security to stay execution.*

When, by the terms of section three hundred and fifty-two, the appellant is entitled to a new trial, in the appellate court, he shall, at the time of taking his appeal, and in all other cases if he desires a stay of execution of the judgment, give security as provided in the next section.

§ 356. [306.] (Am'd 1849.) *Existing suits—Form of undertaking.*

The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the county judge or by the court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

§ 357. [307.] (Am'd 1849.) *Existing suits—Execution, how stayed.*

The delivery of the undertaking to the court below shall stay the issuing of execution; or, if it have been issued, the service

of a copy of the undertaking, certified by the court below, upon the officer holding the execution shall stay further proceedings thereon.

§ 358. [308.] (Am'd 1849.) *Existing suits—In case of death of justice, undertaking to be filed.*

Where, by reason of the death of a justice of the peace, or his removal from the county, or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the clerk of the appellate court, and notice thereof given to the respondent, or his attorney or agent, as provided in section 354; it shall thereupon have the same effect as if delivered to the justice.

§ 359. [309.] (Am'd 1849, 1852.) *Existing suits—Filing in lieu of service of notice of appeal.*

When, by reason of the death of a justice of the peace, or his absence from the county, or any other cause, the notice of appeal cannot be served as provided by section 353, it may be served by leaving the same with the clerk of the county.

§ 360. [311.] (Am'd 1849, 1852, 1862.) *Existing suits—Return, when and how made and compelled.*

The court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment, and file the same in the appellate court. The return may be compelled by attachment. But no justice of the peace shall be bound to make a return unless the fee prescribed by the last section of this chapter be paid on the service of the notice of appeal.

§ 361. [312.] *Existing suits—How made if justice be out of office.*

When a justice of the peace, by whom a judgment appealed from was rendered, shall have gone out of office before a return is ordered, he shall, nevertheless, make a return in the same manner, and with the like effect, as if he were still in office.

§ 362. [313.] (Am'd 1857.) *Existing suits—Further return.*

If the return be defective, the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with its order by attachment. And the court shall always be deemed open for these purposes.

§ 363. [314.] *Existing suits—Justice dead, insane, or absent.*

If a justice of the peace whose judgment is appealed from shall die, become insane, or remove from the State, the appellate court may examine witnesses on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. If he shall have removed to another county within the State, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

§ 364. [315.] (Am'd 1862, 1863.) *Existing suits—Hearing upon return. Dismissing appeal if not brought on.*

If a return be made, and the appeal is from a judgment where a new trial may not be had, as provided by this chapter, it may be brought to a hearing at a general term of the appellate court, upon notice by either party of not less than eight days. It shall be placed upon the calendar, and continue thereon without further notice until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order, for cause shown. If the appeal is from a judgment where a new trial may be had, it may be brought to a hearing or trial at any term of the county court at which a petit jury shall be summoned to attend, upon the same notice as provided for actions in the supreme court; at least eight days before the court, the party desiring to bring on the appeal shall serve a note of issue on the clerk, and the clerk shall thereupon enter the cause on the calendar, according to the date of the return.

And the provisions of this chapter for a new trial shall apply as well to appeals heretofore taken and now pending, as those hereafter to be brought.

§ 365. [316.] (Am'd 1849.) *Existing suits—To be heard on original papers.*

The appeal shall be heard on the original papers, and no copy thereof need be furnished for the use of the court.

§ 366. [317.] (Am'd 1849, 1851, 1862.) *Existing suits—Judgment on appeal. New trial.*

Upon the hearing of the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the justice, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial before the same or any other justice in the same county, at such time and place and on such terms as the court may deem proper. Where a new trial shall be ordered before a justice, the parties must appear before him according to the order of the court, and the same proceedings must thereupon be had in the action as on the return of a summons personally served. If the appeal shall be from a judgment in which a new trial may be had, as in this chapter provided, the court shall proceed to the hearing of the cause, if the issue joined before the justice was an issue of law, or to the trial thereof by jury, if such issue was upon a question of fact.

1. If the issue joined before the justice was an issue of law, the court shall render judgment thereon according to the law of the case; and if such judgment be against the pleadings of either party, an amendment of such pleading may be allowed on the same terms, and in like case, as pleadings in actions in the supreme court, and the court may thereupon require the opposite party to answer

such amended pleading, or join issue thereon, as the case may require, summarily.

2. If, upon an appeal in an issue of law, the court should adjudge the pleading complained of to be valid, it shall, in like manner, require the opposite party summarily to answer such pleading or join issue thereon, as the case may require.

3. Upon an issue of fact being so joined, the court shall proceed to hear the same tried by a jury in the same manner as issues joined in the supreme court.

4. Every issue of fact so joined or brought upon an appeal shall be tried in the same manner as in actions commenced in the supreme court.

5. The court shall have the same power over its own determinations, the verdict of the jury, and shall render judgment thereon in the same manner as the supreme court in actions pending therein.

6. Either party may move for a new trial in said court on a case or exception, or otherwise, and such motion may be made before or after judgment has been entered; and the provisions of this act in relation to the proceedings on receiving the verdict of a jury, exceptions to the decisions of the court, making and settling case and exceptions, motions for new trials, and making up the judgment-roll in the supreme court, are hereby made applicable to all appeals brought up for trial, as in this chapter provided.

§ 367. [318.] (Am'd 1852.) *Existing suits—Judgment-roll.*

To every judgment upon an appeal there shall be annexed the return on which it was heard, which shall be filed with the clerk of the court, and shall constitute the judgment-roll.

§ 368. [321.] (Am'd 1849.) *Existing suits—Costs, how awarded.*

If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party.

§ 369. [322.] (Am'd 1849, 1857.) *Existing suits—Restitution.*

If the judgment below, or any part thereof, be paid or collected,

and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing, upon a previous notice of six days; and if the order shall be made before the judgment is entered, the amount may be included in the judgment.

§ 370. [323.] *Existing suits—Setting off costs and recovery.*

If, upon an appeal, a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

§ 371. [324.] (Am'd 1849, 1851, 1862, 1863, 1864.) *Existing suits—The costs on appeal.*

Costs shall be allowed to the prevailing party in judgments rendered on appeal, in all cases, with the following exceptions and limitations:—In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. Within fifteen days after the service of the notice of appeal the respondent may serve upon the appellant and justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may thereupon, and within five days thereafter, file with the justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket, and correct such judgment accordingly, and the same, so corrected, shall stand as his judgment, and be enforced accordingly; and any execution which has been issued upon the judgment appealed from shall be amended by the justice to correspond with the amended judgment; and no undertaking given to stay execution shall be enforced for more than the amount of the corrected judgment. If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment of the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs. If the offer be made, and accepted by the appellant, the appellant shall recover

all his disbursements on appeal, and all his costs, in the court below. But the appellant shall not recover costs except as provided in this chapter. The respondent shall be entitled to recover costs where the appellant is not.

Whenever costs are awarded to the appellant, he shall be allowed to tax, as part thereof, the costs and fees paid to the justice on making the appeal, as disbursements, in addition to the costs in the appellate court; and when the judgment in the suit before the justice was against such appellant, he shall further be allowed to tax the costs incurred by him which he would have been entitled to recover in case the judgment below had been rendered in his favor.

If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render judgment for the balance.

The following fees and costs, and no other, except fees of officers, disbursements, and witnesses' fees, shall be allowed on appeal to the party entitled to costs as herein provided, when the new trial is in the county court:

For proceedings before notice of trial, ten dollars.

For all subsequent proceedings before trial, seven dollars.

For trial of an issue of law, ten dollars.

For every trial of an issue of fact, fifteen dollars.

For argument of a motion for a new trial on a case of bill of exception, ten dollars.

In all cases, to either party, for every term, not exceeding five, at which the appeal is necessarily on the calendar and is not tried or is not postponed by the court, seven dollars.

In other appeals the costs shall be as follows:—To the appellant, on reversal, fifteen dollars; to the respondent, on the affirmation, twelve dollars. If the judgment appealed from be reversed in part and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding ten dollars. If the appeal be dismissed for want of prosecution, as provided by section 364, no costs shall be allowed to either party. In every appeal, the justice of the peace before whom the judgment appealed from was rendered, shall receive two

dollars for his return. If the judgment be reversed for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the court.

If, in the notice of appeal, the appellant shall not state in what particular or particulars he claims the judgment should have been made more favorable to him, he shall not be entitled to costs unless the judgment appealed from be wholly reversed.

TITLE XII.

Of the Miscellaneous Proceedings in Civil Actions, and General Provisions.

- CHAPTER I. Submitting a controversy without action.
- II. Proceedings against joint debtors, heirs, legatees, devisees, and tenants holding under a judgment debtor.
 - III. Confession of a judgment without action.
 - IV. Offers of the defendant to compromise the whole or a part of the action.
 - V. Admission or inspection of writings.
 - VI. Examination of parties.
 - VII. Examination of witnesses.
 - VIII. Motions and orders.
 - IX. Entitling affidavits.
 - X. Computation of time.
 - XI. Notices, and filing and service of papers.
 - XII. Duties of sheriffs and coroners.
 - XIII. Accountability of guardians.
 - XIV. Powers of referees.
 - XV. Miscellaneous provisions.

CHAPTER I.

Submitting a Controversy without Action.

- SECTION 372. Controversy, how submitted without action.
- 373. Judgment, how enforced.
 - 374. Judgment, how enforced or appealed from.

§ 372. [325.] *Controversy, how submitted without action.*

Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that

the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, at a general term, and render judgment thereon, as if an action were depending.

§ 373. [326.] *Judgment.*

Judgment shall be entered in the judgment-book, as in other cases, but without costs for any proceeding prior to notice of trial. The case, the submission, and a copy of the judgment shall constitute the judgment-roll.

§ 374. [327.] *Judgment, how enforced or appealed from.*

The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

CHAPTER II.

Proceedings against Joint Debtors, Heirs, Devisees, Legatees, and Tenants holding under a Judgment Debtor.

SECTION 375. Parties, not summoned in action on joint contract, may be summoned after judgment.

376. If judgment debtor die, his representatives may be summoned.

377. Form of summons.

378. Summons to be accompanied by affidavit of amount due.

379. Party summoned may answer and defend.

380. Subsequent pleadings and proceedings the same as in an action.

381. Answer and reply to be verified as in an action.

§ 375. [328.] (Am'd 1849.) *Parties, not summoned in action on joint contract, may be summoned after judgment.*

When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section 136, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

12 as to separate prop.

Surrogate has power to sell land within 3 yrs - after 3 yrs resort must be had to Supreme Ct. within 3 yrs resort may be had to Surrogate.

§ 376. [329.] (Am'd 1849.) *If judgment debtor die, his representatives may be summoned.*

In case of the death of a judgment debtor after judgment, the heirs, devisees, or legatees of the judgment debtor, or the tenants of real property owned by him and affected by the judgment, may, after the expiration of three years from the time of granting letters testamentary or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively; and the personal representatives of a deceased judgment debtor may be so summoned, at any time within one year after their appointment. i.e. the land

§ 377. [330.] *Form of summons.*

The summons provided in the last two sections shall be subscribed by the judgment creditor, his representatives or attorney, shall describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons; and shall be served in like manner as the original summons.

§ 378. [331.] *To be accompanied by affidavit of amount due.*

The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and shall specify the amount due thereon.

§ 379. [332.] (Am'd 1849.) *Party summoned may answer and defend.*

Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which may have arisen subsequently; and, in addition thereto, if he be proceeded against according to section 375, he may make the same defence which he might have originally made to the action, except the statute of limitations.

§ 380. [333.] (Am'd 1849.) *Subsequent pleadings and proceedings same as in action.*

The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the

issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary.

§ 381. [334.] (Am'd 1849.) *Answer and reply to be verified as in an action.*

The answer and reply shall be verified in the like cases and manner, and be subject to the same rules, as the answer and reply in an action.

CHAPTER III.

Confession of Judgment without action.

SECTION 382. Judgment may be confessed for debt due or for contingent liability.

383. Statement in writing, and form thereof.

384. Judgment and execution.

§ 382. [335.] *Judgment may be confessed for debt due or contingent liability.*

A judgment by confession may be entered, without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

§ 383. [336.] *Statement in writing, and form thereof.*

A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

§ 384. [337.] (Am'd 1849, 1851.) *Judgment and execution.*

The statement may be filed with a county clerk, or with a clerk of the superior court of the city of New York, who shall endorse upon it, and enter in the judgment-book, a judgment of the supreme or said superior court, for the amount confessed, with five dollars costs, together with disbursements. The statement and affidavit, with the judgment endorsed, shall thenceforth become the judgment-roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due; and whenever any further installments become due, execution may, in like manner, be issued for the collection and enforcement of the same.

CHAPTER IV.

Offer of the Defendant to Compromise the whole or a part of the Action.

- SECTION 385. Offer of Compromise.
- 386. Defendant may offer to liquidate damages.
- 387. Effect of acceptance or refusal of offer.

§ 385. [338.] (Am'd 1851.) *Offer of compromise.*

The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing, within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance; and the clerk must thereupon enter judgment accordingly. If the no-

tice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

§ 386. [339.] *Defendant may offer to liquidate damages conditionally.*

In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

§ 387. [340.] *Effect of acceptance or refusal of offer.*

If the plaintiff do not accept the offer, he shall prove his damages as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expense shall be ascertained at the trial.

CHAPTER V.

Admission or Inspection of Writings.

§ 388. [341, 342.] (Am'd 1849.) *Existing suits—Inspection and copy of books, papers, and documents, how obtained.*

Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there

were good reasons for the refusal. The court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents, in his possession or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

CHAPTER VI.

Examination of Parties.

SECTION 389. Action for discovery abolished.

390. A party may examine his adversary as a witness.

391. Such examination also allowed before trial. Proceeding therefor.

392. Party, how compelled to attend.

393. Testimony of party may be rebutted.

394. Effect of refusal to testify.

395. Testimony of a party not responsive to the inquiries may be rebutted by the oath of the party calling him.

396. Persons for whom action is brought or defended may be examined.

397. Examination of co-plaintiff or co-defendant.

§ 389. [343.] *Action for discovery abolished.*

No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

§ 390. [344.] *Existing suits—A party may examine his adversary as a witness.*

A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission.

§ 391. [345.] (Am'd 1849.) *Existing suits — Such examination also allowed before trial. Proceedings therefor.*

The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

§ 392. [346.] (Am'd 1849.) *Existing suits—Party, how compelled to attend.*

The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

§ 393. [348.] (Am'd 1849.) *Existing suits—Testimony of party may be rebutted.*

The examination of the party, thus taken, may be rebutted by adverse testimony.

§ 394. [347.] (Am'd 1849.) *Existing suits—Effect of refusal to testify.*

If a party refuse to attend and testify, as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer, or reply, may be stricken out.

§ 395. [349.] (Am'd 1849, 1863.) *Existing suits—Testimony by a party not responsive to the inquiries may be rebutted by the oath of the party calling him.*

A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the inquiries put to him by the ad-

verse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

§ 396. [350.] *Existing suits—Persons for whom action is brought or defended may be examined.*

A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

§ 397. (Am'd 1851, 1852.) *Existing suits—Examination of co-plaintiff or co-defendant.*

A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the case mentioned in sections three hundred and ninety and three hundred and ninety-one, one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received.

CHAPTER VII.

Examination of Witnesses.

SECTION 398. Interest not to exclude a witness.

399. Parties to actions and special proceedings may be witnesses on their own behalf, except in certain cases.

§ 398. [351.] *Existing suits—Interest not to exclude a witness.*

No person offered as a witness shall be excluded by reason of his interest in the event of the action.

105 3rd person not a party

§ 399. [352.] (Am'd 1851, 1857, 1858, 1859, 1860, 1862, 1863.)
Existing suits—Parties to actions and special proceedings may be examined as witnesses on their own behalf, except in certain cases.

A party to an action or special proceeding, including proceedings in surrogates' courts and proceedings for the summary recovery of the possession of land, may be examined as a witness on his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination, as any other witnesses; provided, however, that the assignor of a thing in action shall not be examined in behalf of said party, nor shall a party to an action be examined in his own behalf in respect to any transaction or communication had personally by said assignor, or said party, respectively, with a deceased person, against parties who are the executors, administrators, heirs-at-law, next of kin, or assignees of such deceased person, where they have acquired title to the cause of action immediately from such deceased person, or have been sued as such by the executors, administrators, heirs-at-law, next of kin, or assignees. But where such executors, administrators, heirs-at-law, next of kin, or assignees shall be examined on their own behalf in regard to any conversation or transaction had between the deceased person and said assignor, or said party, respectively, then the said assignor or the said party may be examined in regard to such conversation or transaction, but not in regard to any new matter.

But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing, in behalf of his executors, administrators, heirs-at-law, next of kin, or assignees, the other party, or the assignor of a thing in action, shall be a competent witness, as to any and all matters to which the testimony so taken relates, notwithstanding anything in this section contained to the contrary thereof.

CHAPTER VIII.

Motions and Orders.

SECTION 400. Definition of an order.

401. Definition of a motion. Motions, how and when made. Motions in the first district. Stay of proceedings. Compelling parties to testify on motions.

402. Notice of motion.

403. In actions in the supreme court, county judge may exercise powers of a judge at chambers. His orders, how reviewed.

404. In absence, &c., of judge at chambers, motion may be transferred to another judge.

405. Enlarging time for the proceedings in an action.

§ 400. [357.] *Definition of an order.*

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

§ 401. [358 to 362.] (Am'd 1849, 1852, 1858, 1859, 1862.) *Definition of a motion. Motions, how and where made. Motions in the first district. Stay of proceedings. Compelling parties to testify.*

(1.) An application for an order is a motion.

(2.) Motions may be made, in the first judicial district, to a judge or justice out of court, except for a new trial on the merits.

(3.) Orders made out of court, without notice, may be made by any judge of the court, in any part of the State; and they may also be made by a county judge of the county where the action is triable, or by the county judge of the county in which the attorney for the moving party resides, except to stay proceedings after verdict.

(4.) Motions upon notice must be made within the district in which the action is triable, or in a county adjoining that in which it is triable; except that where the action is triable in the first judicial district, the motion must be made therein, and no motion upon notice can be made in the first judicial district, in an action triable elsewhere.

(5.) In all the districts, a motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

(6.) No order to stay proceedings for a longer time than twenty

days shall be granted by a judge out of court, except upon previous notice to the adverse party.

When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed and compelled to attend and make an affidavit before such referee; the same as before a referee to whom it is referred to try an issue. And the fees of such referee for such service shall be three dollars per day.

★ § 402. [363.] (Am'd 1849.) *Notice of motion.*

When a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

§ 403. [364.] *In actions in the supreme court, county judge may exercise powers of a judge at chambers. His orders, how reviewed.*

In an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the supreme court at chambers, according to the existing practice, except as otherwise provided in this act. And in all cases where an order is made by a county judge, it may be reviewed in the same manner as if it had been made by a judge of the supreme court.

§ 404. [365.] (Am'd 1849.) *In absence, &c., of judge at chambers, motion may be transferred by him to another judge.*

When notice of a motion is given, or an order to show cause is returnable before a judge out of court, and at the time fixed for the motion he is absent or unable to hear it, the same may be transferred, by his order, to some other judge, before whom the motion might originally have been made.

§ 405. [366.] (Am'd 1849.) *Enlarging time for proceedings in an action.*

The time within which any proceeding in an action must be had, after its commencement, except the time within which an ap-

peal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court, or if the action be in the supreme court, by a county judge. The affidavit, or a copy thereof, must be served, with a copy of the order, or the order may be disregarded.

CHAPTER IX.

Entitling Affidavits.

§ 406. [367.] *Existing suits—Affidavits defectively entitled, valid.*

It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

CHAPTER X.

Computation of Time.

§ 407. [368.] *Existing suits—Time, how computed.*

The time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last. If the last day be Sunday, it shall be excluded.

CHAPTER XI.

Notices, and Filing and Service of Papers.

- SECTION 408. Notices, &c., how served.
 409. Service, how made.
 410. Service by mail.
 411. The like.
 412. Double time where service by mail.
 413. Notice of motion, &c., where personally served.
 414. When papers need not be served on defendant.
 415. Service of papers where parties reside out of the State.
 416. Summons and pleadings to be filed.
 417. Service on attorney.
 418. When this chapter does not apply.

§ 408. [369.] *Existing suits—Notices, &c., how served.*

Notices shall be in writing; and notices and other papers may

be served on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by this act.

§ 409. [370.] *Existing suits—Service, how made.*

The service may be personal, or by delivery to the party or attorney on whom the service is required to be made; or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

§ 410. [371.] *Existing suits—Service by mail.*

Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

§ 411. [372.] *Existing suits—Service by Mail.*

In case of service by mail, the paper must be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

§ 412. [373.] (Am'd 1848, 1850.) *Existing suits—Double time when served by mail.*

Where the service is by mail, it shall be double the time required in cases of personal service, except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.

§ 413. [374.] (Am'd 1849.) *Existing suits—Notice of motion, &c., when personally served.*

Notice of a motion, or other proceeding before a court or judge, when personally served, shall be given at least eight days before the time appointed therefor.

§ 414. [375.] (Am'd 1849.) *Existing suits—When papers need not be served on defendant.*

Where a defendant shall not have demurred or answered, service of notice or papers, in the ordinary proceedings in an action, need not be made upon him, unless he be imprisoned for want of a bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

§ 415. [376.] (Am'd 1849.) *Existing suits—Service of papers where parties reside out of the State.*

Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the State, and has no attorney in the action, the service may be made by mail, if his residence be known; if not known, on the clerk for the party.

§ 416. [377.] *Summons and pleadings to be filed.*

The summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

§ 417. [378.] *Existing suits—Service on attorney.*

Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

§ 418. [379.] *Existing suits—When this chapter does not apply.*

The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

CHAPTER XII.

Duties of Sheriffs and Coroners.

§ 419. [380.] (Am'd 1849.) *Duty of sheriff and coroner in serving or executing process, and how enforced.*

Whenever, pursuant to this act, the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and all the provisions of this act relating to sheriffs shall apply to coroners when the sheriff is a party.

CHAPTER XIII.

Accountability of Guardians.

§ 420. [381.] *Guardian not to receive property until security given.*

No guardian appointed for an infant shall be permitted to receive property of the infant, until he shall have given sufficient security, approved by a judge of the court or a county judge, to account for and apply the same, under the direction of the court.

CHAPTER XIV.

Powers of Referees.

§ 421. [382.] *Powers of referees.*

Every referee appointed pursuant to this act shall have power to administer oaths in any proceeding before him, and shall have generally the powers now vested in a referee by law.

CHAPTER XV.

Miscellaneous Provisions.

SECTION 422. Papers lost or withheld, how supplied.

423. Where undertakings to be filed.

424. Judgment on bond and warrant of attorney, executed before July 1, 1848.

425. Time for publication of notices, how computed.

426. Laws of other States and governments, how proved.

§ 422. *Papers lost or withheld, how supplied.*

If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

§ 423. *Where undertakings to be filed.*

The various undertakings required to be given by this act must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively for whose benefit they are taken.

§ 424. *Judgment on bond and warrant of attorney executed before July 1, 1848.*

Upon any bond and warrant of attorney, executed and delivered before the first day of July, 1848, judgment may be entered in the manner provided by sections 382, 383, and 384, upon the plaintiff's filing such bond and warrant of attorney, and the statement, signed and verified by himself, in the form prescribed by section 382.

§ 425. *Time for publication of notices, how computed.*

The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication.

§ 426. *Law of other States and governments, how proved.*

Printed copies in volumes of statutes, code, or other written law, enacted by any other State or Territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such State, Territory, or government, shall be admitted by the courts and officers of this State, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other State or Territory, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law.

TITLE XIII.

Actions in Particular Cases.

CHAPTER I. *Actions against foreign corporations.*

- II. *Actions in place of scire facias, quo warranto, and of informations in the nature of a quo warranto.*
- III. *Actions for the partition of real property.*
- IV. *Actions to determine conflicting claims to real property, and for waste and nuisance.*
- V. *General provisions relating to actions concerning real property.*

CHAPTER I.

Actions against Foreign Corporations.

§ 427. *Where and by whom brought.*

An action against a corporation created by or under the laws of any other State, government, or country, may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York, in the following cases:

1. By a resident of this State, for any cause of action.
2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within this State.

CHAPTER II.

Actions in place of scire facias, quo warranto, and of informations in the nature of quo warranto.

SECTION 428. Scire facias and quo warranto abolished, and this chapter substituted.

429. Action may be brought, by direction of the legislature, by the attorney-general, to vacate a charter.
430. Action to annul a corporation, when and how brought by the attorney-general, by leave of the supreme court.
431. Leave to sue, how obtained.
432. Action upon information or complaint of course.
433. Action, when and how brought to vacate letters patent.
434. Relator, when to be joined as plaintiff.
435. Complaint and arrest of defendant in action for usurping an office.
436. Judgment in such actions.
437. Assumption of office, &c., by relator, when judgment is in his favor.
438. Proceedings against a defendant, on his refusal to deliver books or papers.
439. Damages, how recovered.
440. One action against several persons claiming office or franchise.
441. Penalty for usurping office or franchise, how awarded.
442. Judgment of forfeiture against a corporation.
443. Costs against a corporation, or persons claiming to be such, how collected.
444. Restraining corporation, and appointment of a receiver.
445. Copy of judgment-roll against corporation, where to be filed.
446. Entry of judgment relating to letters patent.
447. Action for forfeiture of property to the people.

§ 428. *Scire facias and quo warranto abolished, and this chapter substituted.*

The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of this chapter. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition.

§ 429. *Action may be brought by attorney-general to vacate a charter, by direction of the legislature.*

An action may be brought by the attorney-general, in the name of the people of this State, whenever the legislature shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some

fraudulent suggestion or concealment of a material fact, by the person incorporated, or by some of them, or with their knowledge and consent.

§ 430. *Action to annul a corporation, when and how brought by attorney-general, by leave of supreme court.*

An action may be brought by the attorney-general, in the name of the people of this State, on leave granted by the supreme court or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall—

1. Offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or,

2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or,

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

And it shall be the duty of the attorney-general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted to bring the action, in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the people of this State against the costs and expenses to be incurred thereby.

§ 431. *Leave, how obtained.*

Leave to bring the action may be granted upon the application of the attorney-general; and the court or judge may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

§ 432. *Action upon information or complaint, of course.*

An action may be brought by the attorney-general in the name

of the people of this State, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or

2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or

3. When any association or number of persons shall act within this State as a corporation, without being duly incorporated.

§ 433. *Action, when and how brought to vacate letters patent.*

An action may be brought by the attorney-general, in the name of the people of this State, for the purpose of vacating or annulling letters patent granted by the people of this State, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or

2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or,

3. When he shall have reason to believe that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

§ 434. *Relator, when to be joined as plaintiff.*

When an action shall be brought by the attorney-general, by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people as plaintiff.

§ 435. *Complaint and arrest of defendant in action for usurping an office.*

Whenever such action shall be brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the supreme court for the arrest of such defendant, and holding him to bail; and thereupon he shall be arrested and held to bail, in the manner, and with the same effect and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

§ 436. *Judgment in such actions.*

In every such case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

§ 437. *Assumption of office, &c., by relator, when judgment is in his favor.*

If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he shall have been excluded.

§ 438. *Proceedings against defendant, on refusal to deliver books or papers.*

If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers, as

are prescribed in article 5, title 6, chapter 6, of the first part of the Revised Statutes.

§ 439. *Damages, how recovered.*

If judgment be rendered, upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

§ 440. *One action against several persons claiming office or franchise.*

Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 441. *Penalty for usurping office or franchise, how awarded.*

When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the State.

§ 442. *Judgment of forfeiture against a corporation.*

If it shall be adjudged that a corporation against which an action shall have been brought pursuant to this chapter, has, by neglect, abuse, or surrender, forfeited its corporate rights, privileges, and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges, and franchises, and that the corporation be dissolved.

§ 443. *Costs against corporation, or persons claiming to be such, how collected.*

If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may

cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

§ 444. *Restraining corporation, and appointment of receiver.*

When such judgment shall be rendered against a corporation, the court shall have the same power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof among its creditors, as are given in article 3, title 4, chapter 8, of the third part of the Revised Statutes; and it shall be the duty of the attorney-general, immediately after the rendition of such judgment, to institute proceedings for that purpose.

§ 445. *Copy of judgment-roll against corporation, where to be filed.*

Upon the rendition of such judgment against a corporation, or for the vacating or annulling of letters patent, it shall be the duty of the attorney-general to cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of state.

§ 446. *Entry of judgment relating to letters patent.*

Such secretary shall thereupon, if the record relates to letters patent, make an entry in the records of the commissioners of the land office, of the substance and effect of such judgment, and of the time when the record thereof was docketed; and the real property granted by such letters patent may thereafter be disposed of by such commissioners, in the same manner as if such letters patent had never been issued.

§ 447. *Actions for forfeiture of property to the people.*

Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the people of this State, or to any officer for their use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer, in the supreme court.

March 8th 1864

CHAPTER III.

Action for the Partition of Real Property.

§ 448. *Provisions of the revised statutes applicable to actions of partition.*

The provisions of the revised statutes relating to the partition of lands, tenements, and hereditaments, held or possessed by joint tenants or tenants in common, shall apply to actions for such partition brought under this act, so far as the same can be so applied to the substance and subject-matter of the action, without regard to its form.

CHAPTER IV.

Actions to Determine Conflicting Claims to Real Property, and for Waste and Nuisance.

- SECTION 449. Actions to determine claims to real property, how prosecuted.
 450. Action of waste abolished. Waste, how remediable.
 451. Provisions of revised statutes applicable to action for waste under this act.
 452. When judgment of forfeiture and eviction to be given.
 453. Writ of nuisance abolished.
 454. Remedy for injuries heretofore remediable by writ of nuisance.

§ 449. *Action to determine claims to real property, how prosecuted.*

Proceedings to compel the determination of claims to real property, pursuant to the provisions of the revised statutes, may be prosecuted by action under this act, without regard to the forms of the proceedings as they are prescribed by those statutes.*

* CHAPTER 219.

AN ACT to amend the Revised Statutes relating to proceedings to compel the determination of claims to real property in certain cases, and to apply thereto the provisions of the Code of Procedure. Passed April 18, 1864; three-fifths being present.

SECTION 1. The third section of the second title of the fifth chapter of the third part of the Revised Statutes is hereby amended by striking out the words "and not being a married woman," so that the same shall read as follows:

§ 3. Such notice shall be directed to and served only upon a person being at the time of a full age, and not insane, nor imprisoned on any criminal charge or conviction, and it shall be served by delivering a copy thereof personally to the individual to whom it was directed.

§ 2. The proceedings under the said title, and under the several laws amendatory thereof, and section four hundred and forty-nine of the Code of Civil Procedure, are hereby declared to be applicable to married women.

§ 3. This act shall take effect immediately.

claim acted by person in possession to quiet title
 out of possession the reverse of 250

§ 450. *Action of waste abolished. Waste, how remediable.*

The action of waste is abolished: but any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected thereby. Wrongs heretofore remediable by action of waste are subjects of action as other wrongs, in which action there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises.

§ 451. *Provisions of revised statutes applicable to action for waste under this act.*

The provisions of the revised statutes relating to the action of waste shall apply to an action for waste brought under this act, without regard to the form of the action, so far as the same can be so applied.

§ 452. *When judgment of forfeiture and eviction to be given.*

Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice.

§ 453. *Writ of nuisance abolished.*

The writ of nuisance is abolished; but any proceedings heretofore commenced, or any judgment rendered, or right acquired, shall not be affected thereby.

§ 454. *Remedy for injuries heretofore remediable by writ of nuisance.*

Injuries heretofore remediable by writ of nuisance are subjects of action, as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both.

CHAPTER V.

General Provisions relating to Actions concerning Real Property.

§ 455. *Provisions of revised statutes applicable thereto.*

The general provisions of the revised statutes relating to actions concerning real property shall apply to actions brought under this act, according to the subject-matter of the action, and without regard to its form.

1.2 action of real property
Devised TITLE XIV.

Provisions relating to Existing Suits.

SECTION 456. Appeal from order at special term, on a summary application after judgment.

457. Writ of error abolished, and appeal substituted.

458. Execution on judgment docketed prior to July 1, 1848.

459. Application of this act to actions pending. Extraordinary terms.

460. Appeal from certain final decrees allowed.

461. Issue of fact in county court, how tried.

§ 456. *Appeal from order at a special term, on summary application after judgment.*

The appeal mentioned in section 9 of the act to facilitate the determination of existing suits in the courts of this State, may also be taken from an order made at a special term, on a summary application in an action after judgment, when such order involves the merits of the application, or some part thereof.

§ 457. *Writ of error in all cases abolished. Appeal substituted.*

No writ of error shall be hereafter issued in any case whatever. Wherever a right now exists to have a review of a judgment rendered, or order or decree made, before the first day of July, 1848, such review can only be had upon an appeal taken in the manner provided by this act; and all appeals heretofore taken from such judgments, orders, or decrees, under the provisions of the code of procedure, which are still pending in an appellate court, and not dismissed, shall be valid and effectual. But this section shall not

extend the right of review to any case or question to which it does not now extend, nor the time for appealing, nor shall it apply to a case where a writ of error has been already issued.

§ 458. *Execution, when issuable on a judgment docketed before July 1, 1848.*

An execution may be issued, without leave of the court, upon a judgment docketed before the first day of July, 1848, or now or hereafter to be rendered in an action pending on that day, at any time within five years after the rendering of the judgment.

§ 459. (Am'd 1851.) *Application of this act to actions pending. Extraordinary terms.*

The provisions of this act apply to future proceedings in actions or suits heretofore commenced and now pending, as follows:

1. If there have been no pleading therein, to the pleadings and all subsequent proceedings;
2. When there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings;
3. After a judgment or order, to the proceedings to enforce, vacate, modify, or reverse it, including the costs of an appeal. Whenever the judges of the supreme court in any district find that the court at any term or circuit has not been, or will not be, able to dispose of all the cases upon the calendar, they may request the governor to assign other judges, and, if necessary, appoint extraordinary terms and circuits, for the purpose of disposing of such cases. The governor may thereupon make such assignment, and the judges assigned must hold the courts accordingly.

§ 460. (Am'd 1851, 1852, 1858.) *Appeal from certain final decrees allowed.*

An appeal may be taken from any final decree entered upon the direction of a single judge, in any suit in equity pending in the supreme court on the first day of July, 1847, at any time before the first day of November, 1852. But this provision shall not apply to cases where a rehearing has already been had or ordered, or to the case of a decree entered before the passage of this act, and to review which no attempt in good faith has been or shall

have been made within thirty days after notice of the entry of such decree. Such appeal shall be taken in the manner provided in sections 327 and 348. In all cases of appeal to the court of appeals, in actions which were originally commenced in the late court of chancery of this State, the court of appeals shall review the cause upon the facts and the law, without any statement or specification of facts found, or any exception taken at the trial of any or either of them. And it shall be, and is hereby declared to be, the duty of the court of appeals, in any and all such cases, to review the whole matter upon the evidence as well as the law.

§ 461. *Issue of fact in county court, how tried.*

An issue of fact joined in a county court, or court of common pleas, before the first day of July, 1848, or then pending in that court on appeal, shall be tried by a jury, unless the parties otherwise agree.

TITLE XV.

General Provisions.

- SECTION 462. Definition of real property.
 463. Definition of personal property.
 464. Definition of property.
 465. Definition of district.
 466. Definition of clerk.
 467. Rule of construction.
 468. Inconsistent statutory provisions repealed.
 469. Inconsistent rules and practice abrogated.
 470. Judges to meet and make general rules.
 471. Certain proceedings and statutory provisions not affected by this act.
 472. Certain statutes repealed.
 473. Act, when to take effect.

§ 462. [383.] *Definition of "real property."*

The words "real property," as used in this act, are co-extensive with lands, tenements, and hereditaments.

§ 463. [384.] *Definition of "personal property."*

The words "personal property," as used in this act, include money, goods, chattels, things in action, and evidences of debt.

§ 464. [385.] *Definition of "property."*

The word "property," as used in this act," includes property real and personal.

§ 465. [386.] *Definition of "district."*

The word "district," as used in this act, signifies judicial district, except when otherwise specified.

§ 466. [387.] *Definition of "clerk."*

The word "clerk," as used in this act, signifies the clerk of the court where the action is pending, and, in the supreme court, the clerk of the county mentioned in the title of the complaint, or in another county to which the court may have changed the place of trial, unless otherwise specified.

§ 467. *Rule of construction.*

The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this act.

§ 468. [388.] (Am'd 1849.) *Statutory provisions inconsistent with this act repealed.*

All statutory provisions inconsistent with this act are repealed; but this repeal shall not revive a statute or law which may have been repealed or abolished by the provisions hereby repealed. And all rights of action given or secured by existing laws may be prosecuted in the manner provided by this act. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.

§ 469. [389.] (Am'd 1849.) *Rules and practice inconsistent with this act abrogated.*

The present rules and practice of the courts in civil actions, inconsistent with this act, are abrogated; but where consistent with this act, they shall continue in force, subject to the power of the respective courts to relax, modify, or alter the same.

§ 470. (Am'd 1851, 1852.) *Judges to meet and make general rules.*

The judges of the supreme court, of the superior court of the city of New York, and of the court of common pleas for the city and county of New York, shall meet in general session at the capitol in the city of Albany, on the first Wednesday in August, 1852, and every two years thereafter; and at such sessions shall revise their general rules, and make such amendments thereto, and such further rules not inconsistent with this code, as may be necessary to carry it into full effect. The rules so made shall govern the supreme court, the superior court of the city of New York, the court of common pleas for the city and county of New York, and the county courts, so far as the same may be applicable.

§ 471. [390.] (Am'd 1849, 1852, 1862, 1863.) *This act not to affect certain proceedings and statutory provisions.*

Until the legislature shall otherwise provide, the second part of this act shall not affect proceedings upon mandamus or prohibition; nor appeals from surrogates' courts, except that the costs on such appeal shall be regulated and allowed in the manner provided in section three hundred and eighteen of this act; nor any special statutory remedy not heretofore obtained by action; nor any existing statutory provisions relating to actions not inconsistent with this act, and in substance applicable to the actions hereby provided; nor any proceedings provided for by chapter five of the second part of the Revised Statutes, or by the sixth and eighth titles of chapter five of the third part of those statutes, or by chapter eight of the same part, excluding the second and twelfth titles thereof, or by the first title of chapter nine of the same part; except that when, in consequence of any such proceeding, a civil action shall be brought, such action shall be conducted in conformity to this act; and except, also, that where any particular provision of the titles and chapters enumerated in this section shall be plainly inconsistent with this act, such provision shall be deemed repealed.

In actions or proceedings by mandamus, amendments of any mistakes in the process, pleadings or proceedings therein may be

*not issued from Superior Court to county
Direct Court not to take account of costs*

allowed, and shall be made in conformity to the provisions of chapter six, title six, of the second part of the Code of Procedure.

§ 472. *Certain parts of Revised and other Statutes not repealed.*

Nothing in this act contained shall be taken to repeal section 23 of article 2 of title 5 of chapter 6, part third, of the Revised Statutes, or to repeal an act to extend the exemption of household furniture and working tools from distress for rent and sale under execution, passed April 11, 1842.

§ 473. [391.] (Am'd 1849.) *This act, when to take effect.*

This act shall take effect on the first day of July, 1848; except that sections 22, 23, 24 and 25 shall take effect immediately.

APPENDIX.

RULES OF COURT.

COURT OF APPEALS.

RULE I. *The return.*—When the appeal is from a judgment, the return of the clerk of the court below shall consist of certified copies of the notice of appeal and the judgment-roll. When the appeal is from such an order as is mentioned in the eleventh section of the code of procedure, the return shall consist of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making the order.

RULE II. *Appellant to file return; effect of his omission.*—The appellant shall cause the proper return to be made and filed with the clerk of this court, within twenty days after the appeal shall be perfected. If he fail to do so, the respondent may, by notice in writing, require such return to be filed within ten days after service of the notice; and if the return be not filed in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving when the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

RULE III. *Further return may be ordered.*—If the return made by the clerk of the court below shall be defective, either party may, on an affidavit specifying the defect, apply to one of the judges of this court for an order that the clerk make a further return without delay.

RULE IV. *Attorneys and guardians below to continue to act.*—The attorneys and guardians *ad litem* of the respective parties in the court below, shall be deemed the attorneys and guardians of

the same parties respectively in this court, until others shall be retained or appointed, and notice thereof shall be served to the adverse party.

RULE V. *Appellant to make a case ; its form.*—In all calendar causes a case shall be made by the appellant, which shall consist of a copy of the return of the clerk, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured. If the case is voluminous, an index to the pleadings, exhibits, depositions, and other principal matters shall be added.

Every opinion in the cause, at special term as well as at general term, relating to the questions involved in the appeal, is included by the foregoing provisions.

RULE VI. *Cases and points to be printed ; mode of printing.*—All cases and points, and all other papers furnished to the court in calendar causes, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause, unless the requirements of the preceding sentence shall be shown by affidavit to have been complied with, in all papers printed after August 1, 1857.

RULE VII. *Appellant to serve copies of case ; effect of his default.*—Within forty days after the appeal is perfected, the appellant shall serve three printed copies of the case on the attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing, require the service of such copies within ten days after the service of the notice, and if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving the default, and the service of such notice, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

RULE VIII. *Notice of argument ; calendar.*—Either party may bring on the argument on a notice of eight days; which notice, except in criminal cases, shall be for the first day of the term.

A copy of the notice, specifying the judicial district in which the cause originated, shall be furnished to the clerk eight days before the first day of the term.

The clerk shall make a calendar of the causes thus noticed, arranging them in the order in which the returns were filed, specifying the judicial district in which the causes originated respectively.

Copies of the calendar for the use of the judges, and six other copies to be delivered to the clerk, shall be printed, in like manner as cases and points are directed to be printed.

RULE IX. *Copies of cases for judges and copies of points for the court and adverse party.*—At the commencement of the argument the appellant shall furnish a printed copy of the case to each of the judges, and shall deliver six other copies to the clerk. Each party shall, at the same time, furnish to each of the judges a printed copy of the points on which he intends to rely, with a reference to the authority which he intends to cite; and shall deliver six other copies to the clerk, and three copies to the counsel of the adverse party.

The cases, points and calendars delivered to the clerk shall be disposed of as follows: one copy of each shall be kept by the clerk with the records of the court, one copy shall be deposited in the State library, one copy shall be deposited in each branch of the library of the court of appeals, one copy shall be deposited in the library of the New York Law Institute, and one copy shall be delivered to the reporter.

RULE X. *Statement of facts on the points. Discussion on questions of fact.*—In all cases each party shall briefly state upon his printed points the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

RULE XI. *Judgment of affirmance or reversal by default.*—The party who has noticed and placed the cause on the calendar for argument, may take judgment of affirmance or reversal, as the case may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases of points as required by the ninth and tenth rules.

RULE XII. *Only one counsel to be heard on each side, unless by order.*—In the argument of calendar causes and motions, only one counsel shall be heard on each side, unless the court shall otherwise direct.

RULE XIII. *Criminal cases preferred on calendar.*—Criminal cases shall have a preference, and may be moved, on behalf of the people, out of their order on the calendar.

RULE XIV. *Submitting case on printed arguments.*—Causes which have not been exchanged may be submitted at any time in term on printed arguments. Exchanged causes cannot be submitted until reached upon the calendar.

RULE XV. *Motions.*—Motions will be heard on the morning of the first day, and on the morning of each following Tuesday and Friday during the term, before taking up the calendar.

Where notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course.

If a motion be not made on the day for which it has been noticed, the opposing party will be entitled, on applying to the court at the close of the motions for that day, to a rule denying the motion, with costs.

RULE XVI. *Remittitur.*—The remittitur shall contain a copy of the judgment of this court, and the return made by the clerk of the court below; and shall be sealed with the seal, and signed by the clerk, of this court.

RULE XVII. *On affirmance or reversal by default, remittitur to be stayed.*—When a decree or order shall be affirmed or reversed by the default of either party, the remittitur shall not be sent to the court below, unless this court shall otherwise direct, until ten days after notice of the affirmance or reversal shall have been served on the attorney of the party in default. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served.

RULE XVIII. *Enlarging time. Revoking orders.*—The time prescribed by these rules for doing any act, may be enlarged by the court or by either of the judges thereof; and either of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings according to the terms of the order. Any order may be revoked or modified by the judge who made it, or, in case of his absence or inability to act, by either of the other judges.

RULE XIX. *Rules, when to take effect.*—These rules shall take effect on the first day of July next, from which time all former rules are abrogated, except so far as it may be necessary to follow them upon appeals and writs of error which shall be then pending.

RULE XX. *Call of Calendar.*—Ten causes only will be called on any day, but after such call, cause ready on both sides will be heard in their order. Any cause which is regularly called and passed without postponement by the court for good cause shown,

at the time of the call, will be placed on all subsequent calendars as if the return had been filed on the day when it was so passed.

Causes upon the calendar may be exchanged one for another of course, on filing with the clerk in court a note of the proposed exchange with the numbers of the causes, signed by the respective attorneys or counsel. Upon all subsequent calendars, each of said causes will take the place due to the date of the filing of the return in the other.

Any cause, except the first ten upon the calendar, may be struck therefrom before it is reached, of course and without prejudice, by the clerk in court, on consent of the parties who placed the same upon the calendar, at any time during the first week of the term.

RULE XXI. *Duty of clerk as to exchanged causes and calendar.*—The clerk must keep a memorandum of such exchanged and passed causes, and place them upon all subsequent calendars, in accordance with the foregoing provisions.

Rules VI., X., XX., and XII., with a notice that "14 copies of cases and points are required," must be printed on the first leaf of the calendar.

RULE XXII. *Each counsel limited to two hours.*—In the argument of a cause, not more than two hours shall be occupied by each counsel, except by the express permission of the court.

RULE XXIII. (*Adopted June, 1860.*) *Preferred causes.*—According to existing laws, causes which are preferred take their preference in the following order:

1. Criminal actions.
2. Cases of probate, in which the appeal prevents the issuing of letters testamentary or of general administration.
3. Appeals in which the sole plaintiffs or defendants are executors or administrators.
4. All other preferred cases.

Any party claiming a preference must so state in his notice of argument to the opposite party, and to the clerk; and he must also state the ground of such preference, so as to show to which of the above classes the case belongs. In making up the calendar, the clerk will place the preferred causes at the head in the order above prescribed. A preferred cause being once passed without reservation, will take its place in subsequent calendars without preference.

RULE XXIV. (*Adopted January, 1862.*) *Calendar to continue one year.* Causes to be noticed for January term.—The printed calendar for the present January term, and for each succeeding January term, shall stand as the calendar for the entire year. Causes noticed and placed upon the calendar for the January term of any

year, shall be considered as noticed for all the subsequent terms. Additional causes may be noticed for the March term, 1862, which shall be printed with their appropriate numbers, and annexed to the calendar. After the January term in each year hereafter, no causes, except such as are by law entitled to a preference, will be permitted to be placed upon the calendar without the direction of the court.

RULE XXV. (*Adopted January, 1862.*) *No defaults allowed.*—Judgment by default will not be allowed, nor will causes be reserved, or set down for hearing upon a particular day, except in extraordinary cases. When a cause is called in its order upon the calendar, it must be either argued, submitted or passed. If either party appear alone, he may, at his option, be heard orally, or submit the case upon his printed brief. If the appellant only appears, he shall furnish the court with the usual number of printed copies of the case, and of his points; if the respondent, he shall hand to the court the copies of the case served upon him, and fourteen printed copies of his points. The party thus appearing and arguing or submitting his case, shall hand to the clerk a printed copy of his brief, to be delivered, whenever called for, to the opposite party, who may at any time within twenty days after the hearing, furnish each member of the court, and serve upon the opposite party, a printed answer to such brief, which may be replied to in like manner at any time within fifteen days after such service.

RULE XXVI. (*Adopted January, 1862.*) *Call of calendar.*—The call of the calendar at the second, and each subsequent term in the year, will commence at the point where it terminated at the previous term, except that causes placed upon the calendar at the next March term, if entitled by their date or otherwise to priority over the causes remaining upon the calendar, will be first called. Causes which are passed, and which, of consequence, go to the foot of the calendar, will resume their original places upon the calendar for the ensuing year.

RULE XXVII. (*Adopted January, 1864.*) *Proof of service of notice of argument.*—In all cases where the notice of argument is filed with the clerk of this court, there shall be filed with the same due proof or admission of the service of notice of argument upon the adverse party. And the clerk is directed not to enter on the calendar any cause in which proof of the service of said notice is not filed with him.

RULE XXVIII. (*Adopted January, 1864.*) *Re-argued causes.*—All causes in which a re-argument is ordered, may, at the election of either party, be placed on the calendar at the next term after such re-argument is ordered, or the following term. The same to take its original place in the calendar.

COURT RULES.

ADOPTED AUGUST 4, 1858.

See Code, s. 470.

ORDERED, that the following rules shall commence and take effect on the first day of October next:

RULE 1. *Examination of candidates for admission.*—Applicants for admission to practice as attorneys and counselors of this court, who are entitled to examination, shall be examined in open court; the examination shall be had at general term, and shall commence on the first Wednesday of the second and fourth general terms which shall be held in the several judicial districts in each year, and at no other time or place; and no private examination shall be permitted.

RULE 2. *Proof of citizenship, &c. Applicants from other States. To sign roll, &c., on admission.*—To entitle an applicant to an examination, he must prove to the court—

1. That he is a citizen of the United States, and that he is twenty-one years of age, and a resident of the district in which he applies, which proof may be made by his own affidavit of the fact.

2. The evidence of good moral character shall be the certificate of a reputable counselor of this court, or of some other reputable person known to the court; but such certificate shall not be deemed conclusive evidence, and the court must be satisfied on the point, after a full examination and inquiry.

3. Such applicant must sustain a satisfactory examination upon the law of real and personal property, contracts, partnership, negotiable paper, principal and agent, principal and surety, insurance, executors and administrators, bailments, corporations, personal rights, domestic relations, wills, equity jurisprudence, pleadings, practice and evidence.

4. Applicants for admission from other States shall conform to the foregoing rules, unless they produce a certificate from a judge of the highest court of original jurisdiction in the State from which

they come, to the effect that for three years, immediately preceding, they have practiced as attorneys or counselors in such court, and that they are in good standing as such attorneys or counselors.

5. Applicants admitted shall sign a roll, and subscribe and take the constitutional oath of office.

RULE 3. *Where papers to be filed. Papers on special motion to be filed.*—Papers shall be filed in the county specified in the complaint as the place of trial, or in the county to which the place of trial has been changed. And in case the place of trial has changed for the reason that the proper county is not specified, the papers on file at the time of the order making such change shall be transferred to the county specified in such order; and all other papers in the cause shall be filed in the county so specified.

When the affidavits and papers upon a non-enumerated motion are required by law to be filed, and the order to be entered in a county other than that in which the motion is made, the clerk shall deliver to the party prevailing in the motion, unless the court shall otherwise direct, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits and papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified. And it shall be the duty of the party to whom such papers are delivered to cause the same to be filed, and the proper order entered in the proper county within ten days thereafter, or, in default thereof, he shall lose the benefit of the said order.

RULE 4. *Undertakings and affidavits to be filed.*—It shall be the duty of the plaintiff's attorney forthwith to file with the clerk of the proper county all undertakings given upon procuring an order of arrest, an injunction order, or an attachment, with the approval of the justice or judge taking the same endorsed thereon; and in case such undertakings shall not be filed within five days after the order for arrest or injunction, or the attachment, has been granted, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given. It shall also be the duty of the attorney to file within the same time, and under the like penalty, the affidavits upon which an injunction or attachment has been granted, and also the affidavit upon which an order for the service of a summons by publication or an order for a substituted service of a summons has been granted, together with the order for such service.

RULE 5. *Bail, where to justify.*—Whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.

RULE 6. *Sureties to justify, and value of security to be proved. Undertakings to be acknowledged.*—Whenever a justice or other offi-

cer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortgage on real estate, to require proof of the value of such estate. And all bonds and undertakings, and other securities in writing, shall be duly proved or acknowledged, in like manner as deeds of real estate, before the same shall be received or filed.

RULE 7. *Sheriff to file affidavits on arrest.*—The sheriff shall file with the clerk the affidavits on which an arrest is made, within ten days after the arrest.

RULE 8. *Sheriff compelled to return process.*—At any time after the day when it is the duty of the sheriff, or other officer, to return, deliver, or file any process, undertaking, order, or other paper, by the provisions of the Code of Procedure, any party entitled to have such act done may serve on the officer a notice to return, deliver, or file such process, undertaking, order, or other paper, as the case may be, within ten days, or show cause, at a special term to be designated in said notice, why an attachment should not issue against him.

RULE 9. *Clerks to keep books. Judgments to be filed, &c., only during office hours.*—The several clerks of this court shall keep in their respective offices, in addition to the "judgment-book" required to be kept by § 279 of the Code of Procedure, a book, properly indexed, in which shall be entered the titles of all civil actions and special proceedings, with proper entries under each, denoting the papers filed and the orders made, and the steps taken therein, with the dates of the several proceedings; an index of all undertakings filed in the office, stating, in appropriate columns, the title of the cause or proceeding in which it is given, with a general statement of its condition, or a reference to the statute under which it is given; the date when and before whom acknowledged or proved, by whom approved, and when filed, with a statement of any disposition or order made of or concerning it; and such other books, properly indexed, as may be necessary to enter the minutes of the court, docket judgments, enter orders and all other necessary matters and proceedings; and such other books as the courts of the respective districts, at a general term, may direct.

Judgments shall only be filed and entered, or docketed, in the offices of the clerks of the courts of this State, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business.

RULE 10. *Attorneys to endorse name and residence on papers served.*—On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto his place of business; and if he shall neglect to do so, papers may be served on

him at his place of residence, through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

RULE 11. *What to be deemed an appearance.*—Service of notice of an appearance or retainer generally, by an attorney for the defendant, shall in all cases be deemed an appearance. And the plaintiff, on filing such notice, at any time thereafter, with proof of service thereof, may have the appearance of the defendant entered as of the time when such notice was served.

RULE 12. *Change of attorney.*—An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon the application of the client, by order of the justice of the court, and not otherwise.

RULE 13. *Stipulation must be in writing or entered.*—No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order, by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

RULE 14. *Application for discovery, how made.*—Applications may be made in the manner provided by law to compel the production and discovery of books, papers, and documents relating to the merits of any civil action pending in this court, or of any defence in such action, in the following cases:

1. By the plaintiff, to compel the discovery of books, papers, or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers, or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

3. Either party may be compelled to make discovery as provided by § 388 of the Code.

RULE 15. *Moving papers, what to state.*—The moving papers upon the application for such discovery, shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers, and documents whereof discovery is sought, are not in the possession nor under the control of the party applying therefor. The party applying shall show to the satisfaction of the court, or judge, the materiality and ne-

cessity of the discovery sought, and the particular information which he requires.

RULE 16. *Order for discovery.*—The order for granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or by requiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed in the order. The order shall also specify the time within which the discovery is to be made. And when papers are required to be deposited, the order shall specify the time that the deposit shall continue, and shall also declare the consequences of an omission to comply with the same; and the court, at any special term, upon proof of the default, may of course grant a rule absolute giving effect to such order, either by non-suiting the plaintiff, striking out the defendant's answer, debarring him from a particular defence, excluding the paper from being given in evidence, or punishing the party in default as for a contempt, as the order for the discovery may require.

RULE 17. *Order for discovery to operate as a stay of proceedings.*—The order directing the discovery of books, papers or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or vacated; and the party obtaining such order, after the same shall be complied with or vacated, shall have the like time to prepare his complaint, answer, reply or demurrer, to which he was entitled at the making of the order. But the justice, in granting the order, may limit its effect, by declaring how far it shall operate as a stay of proceedings.

RULE 18. *Affidavit of serving summons.*—Where the service of the summons and of the complaint, or notice, if any, accompanying the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state, in his affidavit of service, when and at what particular place he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state, in his affidavit, whether he left with the defendant such copy, as well as delivered it to him.

RULE 19. *Numbering causes of action or grounds of defence.*—In all cases of more than one distinct cause of action, defence, counterclaim or reply, the same shall not only be separately stated, but plainly numbered.

RULE 20. *Folios to be marked, and title of cause endorsed. Pleadings to be legibly written. Objections, when waived.*—The attorney, or other officer of the court, who draws any pleading, deposition, affidavit, case, bill of exceptions, report, or other paper, or enters any judgment, exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof; and all copies either for the parties or the court, shall be numbered or marked in the margin so as to conform to the original draft or entry and to each other, and shall be endorsed with the title of the cause. And all the pleadings and other proceedings, and copies thereof, shall be fairly and legibly written; and if not so written and folioed, and endorsed, as aforesaid, the clerks shall not file such as may be offered to them for that purpose; nor will the court hear any motion or application founded thereon. The party upon whom the paper is served shall be deemed to have waived the objection, unless, within twenty-four hours after the receipt thereof, he returns such paper to the party serving the same, with a statement of the particular objection to its receipt.

RULE 21. *Advice of counsel, how stated.*—Whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel.

RULE 22. *Time to answer not extended without affidavit of merits. Subsequent extension.*—No order extending the time to answer or demur to a complaint shall be granted, unless the party applying for such order shall present to the justice or judge to whom the application shall be made, an affidavit of merits, or an affidavit of the attorney or counsel retained to defend the action, that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defence, upon the merits, to the cause of action set forth in the complaint, or to some part thereof.

And if any extension of time to answer or demur has been granted, by stipulation or order, the fact shall be stated in the affidavit.

RULE 23. *Subsequent application for order, after a refusal.*—If any application for an order be made to any judge or justice, and such order be refused, in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other judge or justice; and if, upon such subsequent application, any order be made, it shall be revoked; and in his affidavit for such order, the party shall state whether any previous application for such order has been made.

RULE 24. *Judgment on failure to answer, where to be applied for.*—When the plaintiff in the action is entitled to judgment, upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any special term, in the district embracing the county in which the action is triable, or in an adjoining county; such application may also be made at a circuit court in the county in which the action is triable. But when a reference or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable, unless the court shall otherwise order.

RULE 25. *Judgment after service by publication.*—In actions for the recovery of money only, when the summons has been served by publication, under section 135 of the Code, no judgment shall be entered, unless the plaintiff, at the time of making the application for judgment, shall show by affidavit that an attachment has been issued in the action, and levied upon property belonging to the defendant; which affidavit shall contain a specific description of such property, and a statement of its value, and shall be attached to and filed with the affidavits of publication; nor unless the plaintiff shall, at the same time, produce and file with the clerk an undertaking, with two sureties to be approved by the court, that the plaintiff will abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defence.

RULE 26. *Plaintiff may stipulate to proceed to trial.*—Whenever the plaintiff shall have neglected to bring his cause to trial according to the practice of the court, and the same shall not have been noticed by the defendant, the plaintiff may, if he has not before stipulated, tender a stipulation, and offer to pay the costs to which the defendant is entitled up to that time.

RULE 27. *Dismissing complaint for not bringing cause to trial.*—Whenever an issue of fact shall have been joined in any action, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant may move for the dismissal of the complaint with costs.

If it is made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court shall permit the plaintiff, on payment of costs, to bring the said action to trial at the next court where the same is triable.

RULE 28. *Issues of fact, how tried.*—Issues of fact to be tried by the court, may be tried at the circuit or special term.

RULE 29. *In what cases inquests may be taken.*—Inquests may be taken in actions, out of their order on the calendar, in cases in which they were heretofore allowed at the opening of the court, on any day after the first day of the court, provided the intention to take an inquest is expressed in the notice of trial, and a sufficient affidavit of merits shall not have been filed and served.

RULE 30. *Examination of witnesses, how conducted. Time for summing up.*—On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause; and during such examination the examining counsel shall stand; and the testimony, if taken down in writing, shall be written by some person other than the examining counsel; but the justice who holds the court may otherwise order, or dispense with this requirement.

No counsel shall occupy more than one hour in summing up, unless by permission of the court.

RULE 31. *Calling plaintiff. Submitting to nonsuit.*—It shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict; and the plaintiff shall have no right to submit to a nonsuit, after the jury have gone from the bar to consider of their verdict.

RULE 32. *Submitting to nonsuit or dismissal before referees. Form of referees' report. Proceedings on references other than of the issues.*—On a hearing before referees, the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision. In which case the referee shall report according to the fact, and judgment may thereupon be perfected by the defendant.

Upon a trial by referees, they shall, in their decision and final report, state the facts found by them and their conclusions of law separately; a copy of which shall be served with notice of the judgment; and the time within which exceptions may be taken to the report shall be computed from the time of such service.

In references other than for the trial of the issues in an action, upon the coming in of the report of the referee, the same shall be filed, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause, or proceeding, and the said report shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served

within eight days after service of notice of the filing the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein.

RULE 33. *Issues, how settled. Issues on question of adultery. Motion for new trial.*—In cases where the trial of issues of fact is not provided for in section 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion, to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in section 72 of the Code of Procedure.

In all actions for a divorce, when issue is joined by the pleadings upon the question of adultery, such issue shall not be tried by a jury until the issue to be tried shall be settled in like manner as in other actions where issues arising out of the pleadings are required to be settled.

When any specific questions of fact involved in an action, or any question of fact not put in issue, is ordered to be tried by a jury, as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under section 271 of the Code and a trial had, if either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except when the judge directs such motion to be made upon his minutes, at the same term or court at which the issues are tried), a case or exceptions shall be made, or a case containing exceptions, as the case may require, which case or exceptions shall be served and settled in the manner prescribed by the rules of court for the settlement of cases and exceptions in other cases. Such motions shall be made in the first instance at special term; and if neither party moves for a new trial in such case, they shall be deemed to have acquiesced in the decision of the judge or referee, and the verdict of the jury or report of the referee; and the same shall not be questioned upon the final hearing of the cause or in any subsequent proceeding therein.

RULE 34. *Settling case, exceptions, and special verdicts.*—Whenever it shall be intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge) or to review by appeal, or otherwise, a trial by a jury, by the court, or by referees, a case, or exceptions, or case containing exceptions, as may be proper and the party may elect, shall be prepared by the party

intending to make the motion or to review the trial, and a copy thereof shall be served on the opposite party within ten days after the trial, if by a jury, or after written notice of the filing of the decision or report, if the trial be by the court or by referees; and the party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing the case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions, with the proposed amendments, will be submitted, at a time and place to be specified in the notice, to the justice or referee before whom the cause was tried, for settlement. The justice or referee shall thereupon correct and settle the case, as he shall deem to consist with the truth of the facts. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than twenty days after service of such notice. The lines of the case shall be so numbered that each copy shall correspond.

Cases reserved for argument, and special verdicts, shall be settled in the same manner.

RULE 35. *Case, how waived and when deemed settled.*—If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the justice or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

RULE 36. *Exceptions, what to contain. Amendments, how to be marked.*—Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the justice, upon settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or justice for settlement, mark upon the several amendments his proposed allowance or disallowance thereof.

RULE 37. *Filing case or exceptions. Order declaring case abandoned.*—Where a party makes a case or exceptions, he shall procure the same to be filed within ten days after the same shall be settled, or it shall be deemed abandoned.

And on filing affidavit that such case or exceptions has not been filed, and showing the time of the settlement thereof, and that more than ten days has elapsed from the time of such settlement,

an order of course may be entered declaring the same abandoned, and the party may proceed as if no case or exceptions had been made.

RULE 38. *Statement of facts on appeal to court of appeals.*—A party desiring to appeal to the court of appeals, in an action tried by the court or referees, may have the facts upon which the decision of the general term was based settled for the purposes of such appeal; and, for the purpose of such settlement, the party shall, within twenty days after notice of the judgment, propose and serve upon the opposite party such a statement of the facts as he deems proper.

The party upon whom such statement is served may, within twenty days after such service, prepare such amendments to the statement as he may deem proper, which amendments shall be in writing and served on the moving party. The party preparing the original statement may give eight days' notice that the statements and amendments will be presented for settlement to the justice who delivered the opinion in the case; or, if no opinion was delivered, to the presiding justice of the court. Such justice shall settle the facts; and upon the statement, as settled by him, he shall indorse an order that the statement be attached to the judgment-roll.

RULE 39. *Arguments and motions, how noticed, and defaults thereon. Orders to show cause, when granted, and how returnable. A stay of proceedings. Irregularities to be stated. Judgment in divorce cases.*—All questions for argument, and all motions, shall be brought before the court on a notice; or, when a notice less than eight days is prescribed by the judge or court, under § 402 of the Code, by an order to show cause; and if the opposite party shall not appear to oppose, the party making the motion or obtaining the order shall be entitled to the rule or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court shall otherwise direct.

Such order to show cause shall only be granted when a special reason for a notice less than eight days appears on the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue, and the time appointed for holding the next circuit in the county where the action is triable. The order shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a special term appointed to be held in the district in which such judge resides.

No order served after the action shall have been noticed for trial, if served within ten days of the circuit, shall have the effect to stay the proceedings in the action, unless made at the circuit where such action is to be tried, or by the judge who is appointed or is to hold such circuit.

And when the motion is for irregularity, the notice or order shall specify the irregularity complained of.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to a complaint for a divorce.

RULE 40. *Enumerated motions. Non-enumerated motions. Contested motions, where to be heard.*—Enumerated motions are, motions arising on special verdict; issues of law; cases; exceptions; appeals from orders sustaining or overruling demurrers; appeals from an inferior court; and appeals by virtue of § 348 of the Code.

Non-enumerated motions include all other questions submitted to the court, and shall be heard at special term, except when otherwise directed by law.

Contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with the circuit, except in actions upon the calendar for trial at such circuit, and in which the hearing of the motion is necessary to the disposal of the cause; and except also that, in counties in which no special term distinct from a circuit is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the circuit and special term in the county in which such actions are triable.

RULE 41. *Filing notes of issues. General-term Calendar. Date of issue.*—Notes of issue for the general term shall be filed eight days before the commencement of the court at which the causes may be noticed. The clerk shall prepare a calendar for the general term, and cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar according to the date of the service of the notice of appeal, and other cases as of the time when the question to be reviewed arose.

RULE 42. *Enumerated motions, how noticed. Papers to be furnished. And by whom.*—Enumerated motions shall be noticed for the first day of term by either party.

The papers to be furnished on such motions shall be, a copy of the pleadings, when the question arises on the pleadings or any part thereof, or of such parts only as relate to the question raised by the demurrer; a copy of the special verdict, return, or other papers on which the question arises; and the party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon trial of issues of law, at least eight days before the time the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit and notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor; provided, however, that in mortgage and

partition cases, where the plaintiff's rights are not contested, no copies of pleadings need be furnished to the court.

The papers shall be furnished by the plaintiff when the question arises on special verdict, and by the party demurring in cases of demurrer, and in all other cases by the party making the motion.

RULE 43. Papers to be furnished on appeal, and by whom. To be printed. Points to be served. Striking cause from calendar. Cases under s. 372.—When an appeal is noticed for a general term, in cases embraced in chapter 3 of title II. of the Code, and of § 348 of the Code, the appellant shall furnish the papers for the court, which consist of a copy of the judgment-roll, together with a case, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place pending the suit, to which shall be added the opinion of the court below, or an affidavit that no opinion in writing was given, or if given, that a copy could not be procured. At the commencement of the argument the appellant shall furnish a printed copy of the papers to each of the judges, together with a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and he shall also deliver to the attorney of the adverse party, at least eight days before the first day of the term, three printed copies of the said papers. And at the commencement of the argument, each party shall serve upon his adversary a printed copy of his points and authorities on which he intends to rely. In case the appellant neglects so to furnish to the adverse party the said number of copies of the papers, the latter shall be entitled to move, on affidavit and notice of motion, for the earliest practicable day in term for hearing non-enumerated motions, that the cause be stricken from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

When a case is agreed upon by the parties, according to § 372 of the Code, the plaintiff shall furnish the necessary papers for argument, duly printed, as in cases of appeal.

RULE 44. Appeal from surrogate's decision. Petition. Answer to petition. Order to answer petition. Guardian ad litem, how appointed. Order to deliver copy petition. Appellant to furnish papers.—On an appeal to this court from the order, sentence, or decree of a surrogate's court, the party appealing shall file a petition of appeal, addressed to this court, with the clerk of the county in which the order, sentence, or decree appealed from was made, within fifteen days after the appeal is entered in the court below, or the appeal shall be considered as waived; and any party inter-

ested in the proceedings in the court below may thereupon apply to this court, *ex parte*, to dismiss the appeal with costs. The petition of appeal shall briefly state the general nature of the proceedings, and of the sentence, order, or decree appealed from; and shall specify the part or parts thereof complained of as erroneous, except where the whole sentence, order or decree is alleged to be erroneous, in which case it shall be sufficient to state that the same and every part thereof is erroneous. And where the appeal is from a sentence or decree on the settlement of the accounts of an executor, administrator or guardian, if the appellant wishes to review the decision as to the allowance or rejection of any particular items of the account, such items shall be specified in the petition of appeal; or the allowance or disallowance of any such items shall not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from. The respondent, in his answer to the petition of appeal in such cases, may also specify any items in the account as to which he supposes the sentence or decree is erroneous as against him and in favor of the appellant. And upon the hearing of the parties upon such appeal, the sentence or decree may be modified as to any such items, in the same manner as if a cross-appeal had been brought by such respondent. The appellant may have an order of course that the respondent in the petition of appeal answer the same within twenty days after the service of a copy of the petition of appeal and notice of the order, or that the appellant be heard *ex parte*. And where the respondent is an adult, upon filing an affidavit of such service upon the attorney of the respondent, if he has appeared either in this court or in the court below by an attorney of this court, or upon the surrogate if he has not appeared by such attorney, and that no answer to the petition of appeal has been received, the appellant may have an order of course that the appeal be heard *ex parte* as against such respondent. Where the respondent is a minor, if he does not procure a guardian ad litem upon the appeal, to be appointed within twenty days after the filing of the petition of appeal, the appellant may apply to a justice of this court, *ex parte*, for the appointment of such guardian. And if the minor has appeared by his guardian ad litem in this court, the appellant may have an order of course that the guardian ad litem of the respondent answer the petition of appeal within twenty days after service of a copy thereof and notice of the order, or that an attachment issue against such guardian. When a petition of appeal is filed, if it has not been served on the adverse party, the respondent may have an order of course that the appellant deliver a copy of the petition of appeal to the attorney, or to the guardian ad litem of the respondent, within ten days after the service of notice of such order, or that the appeal be dismissed; and if the same is not delivered within the time limited by such order, the respondent, upon due notice to the adverse party, may apply at a special term

to dismiss the appeal with costs. Upon the hearing of any such appeal as is referred to in this rule, it shall be the duty of the appellant to furnish the court with a copy of the petition of appeal, and of the answer thereto, if an answer has been received, and a copy of the proceedings below, including a copy of the appeal as entered.

RULE 45. *Points on motions. Discussion on facts.*—In all enumerated motions, each party shall briefly state upon his printed points the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found; and the court will not hear an extended discussion on a mere question of fact.

RULE 46. *Cases, points, &c., how printed.*—The cases and points, and all other papers furnished to this court at a general term in calendar causes, shall be printed on white writing-paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

RULE 47. *Certiorari, when heard.*—Every case on certiorari to subordinate courts, tribunals, or magistrates, may be brought to a hearing by either party, upon the usual notice of argument; and shall be entitled to preference on the morning of any day during the first week of term.

RULE 48. *Non-enumerated motions, hearing of.*—Non-enumerated motions, made in term time, at a general term, will be heard on the first day, and Thursday of the first week, and Friday of the second week, of the term, immediately after the opening of the court on that day. Except in the first judicial district, a party attending pursuant to notice, to oppose a non-enumerated motion, if the same shall not be made on the day for which it is noticed, may, at the close of that order of business, take a rule against the party giving the notice, for costs for attending to oppose.

Motions in criminal cases may be heard on any day in term.

RULE 49. *Non-enumerated motions, how noticed.*—Non-enumerated motions, except in the first district, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made; and the notice shall not be for a later day, unless sufficient cause be shown (and contained in the affidavits served) for not giving notice for the first day.

RULE 50. *Motions to amend pleadings.*—Motions to strike out of any pleading matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being "so indefinite or uncertain, that the precise nature of the charge or defence is not apparent," must be noticed before demurring or answering the pleading, and within twenty days from the service thereof.

RULE 51. *Proceedings on return to mandamus, &c.*—The return to a writ of mandamus, or of prohibition, having been filed, the party making such return may serve a notice upon the relator, requiring him to demur or plead thereto within twenty days after such service; and if no plea or demurrer to such return be interposed within that time, either party may notice the matter for a hearing at the next or any subsequent special term at which the same may, according to the practice of the court, be heard as a non-enumerated motion, and the same shall be heard and disposed of on the said return.

RULE 52. *Additional allowances.*—Applications for an additional allowance, under the provisions of the 309th section of the Code of Procedure, can only be made to the court before which the trial is had, or the judgment rendered.

RULE 53. *Justice's return on appeal, amendment of.*—On appeals from a justice's judgment, where the county court has not jurisdiction, by reason of relationship, &c., a notice of motion for an order to compel the justice to amend his return may be given in twenty days after the date of the certificate of the county judge, and not after that time.

RULE 54. *Number of counsel, &c.*—At the hearing of causes at a general or special term, not more than one counsel shall be heard on each side, and then not more than one hour each, except when the court shall otherwise order.

RULE 55. *Counsel to endorse proof of notice.*—When a rule is obtained, either at a general or special term, by default, the counsel obtaining the same shall indorse his name, as counsel, on the paper containing the proof of notice; and the clerk, in entering the rule, shall specify the name of such counsel.

RULE 56. *Orders on petitions.*—Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.

RULE 57. *Time for complying with orders.*—In all cases where a motion shall be granted on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith shall have twenty days for that purpose, unless otherwise directed in the order. But where costs to be adjusted are to be paid, the party shall have fifteen days to comply with the rule, after the costs shall have been adjusted by the clerk, on notice, unless otherwise ordered.

RULE 58. *Order to stay, with view to change venue. Revoking stay. Notice of revocation.*—No order to stay proceedings for the purpose of moving to change the place of trial shall be granted unless it shall appear, from the papers, that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined. Such order shall not stay the plaintiff from taking any step, except subpoenaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order an affidavit showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

RULE 59. *Affidavits to change venue.*—In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or the defence, or both of them, arose; and those facts will be taken into consideration by the court, in fixing the place for trial.

RULE 60. *Guardians ad litem.*—No person shall be appointed guardian ad litem, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence or prosecution of the suit.

This rule shall not apply to actions for the recovery of money only, or of specific real or personal property, as specified in § 253 of the Code.

RULE 61. *Duty of guardian ad litem.*—It shall be the duty of every attorney or officer of this court to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it

shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defence, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable.

RULE 62. *Guardian not to receive property unless security has been given.*—No guardian ad litem for an infant party, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court to the guardian out of the fund, or recovered by the infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to such infant, sold under a decree, judgment or order of the court, until the guardian has given such further security for the faithful discharge of his trust as the court may direct.

RULE 63. *General guardian, how appointed.*—For the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upwards, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate.

RULE 64. *Age of infant, how ascertained.*—Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upwards, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

RULE 65. *Security by general guardian.*—The security to be given by the general guardian of an infant, shall be a bond in a penalty of double the amount of the personal estate of his ward, and of the gross amount or value of the rents and profits of the real estate, during his minority, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond, over and above all debts; or, instead of personal security, the guardian may give security by way of

mortgage on unincumbered real property of the value of the penalty of his own bond only. But the court, in its discretion, may vary the security where, from special circumstances, it may be found for the interest of the infant; and may direct the principal of the estate, or any part thereof, to be invested in the stocks of the state of New York, or of the United States, or with the New York Life Insurance and Trust Company, the United States Trust Company, or on bond and mortgage for the benefit of the infant, and that the interest or income thereof only be received by the guardian.

RULE 66. *Application to appoint special guardian.*—An infant, by his general guardian, if he has any, and if there is none, by his next friend, may present a petition, stating the age and residence of the infant, the situation and value of his real and personal estate, the situation, value, and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper, and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition shall be accompanied by affidavits of disinterested persons, or other proofs, verifying the material facts and circumstances alleged in the petition. And if the infant is of the age of fourteen, he shall join in the application.

RULE 67. *Order on petition to appoint guardian. Proceedings on such order.*—If it satisfactorily appears that there is reasonable ground for application, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of as to its form and manner of execution by a justice of this court or a county judge, signified by his approbation endorsed thereon, and directing a reference to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, also to ascertain the value of her life-estate in the premises, on the principle of life annuities. But no proceedings shall be had upon such reference, until the guardian produces a certifi-

cate to the clerk, that the requisite security has been duly proved or acknowledged, and filed agreeably to the order of the court; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report.

The said report shall contain, in itself, a statement of the particular reasons which, in the opinion of the referee, render a sale of the premises necessary or proper, and of all the facts required to be ascertained and reported, and shall not refer to the petition or affidavits for such statements.

RULE 68. *Security by special guardian.*—The security required on a sale of the real estate of an infant, shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond, over and above all debts; or a similar bond of the guardian only, secured by a mortgage on unincumbered real estate, of the value of the penalty of such bond.

RULE 69. *Proceeds to be brought into court.*—If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars. And where several infants are interested in the same premises as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

RULE 70. *When moneys may be paid to general guardian. Orders to pay money.*—No moneys arising from the sale of the real estate of an infant, on a mortgage or partition sale, or under any decree, judgment, or order of court, shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance; unless such guardian has previously given sufficient security on unincumbered real estate, to account to the infant for the same, in the usual form.

No order shall be made for the payment of any such moneys to any person claiming the same, except upon petition, accompanied by a certified copy of the order in pursuance of which the money

was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the funds, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon.

RULE 71. Reference to compute amount due on mortgage. When proof of facts to be also taken. Judgment at special term. Proof of filing notice of lis pendens.—If in an action to foreclose a mortgage the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to the clerk, or to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

Where no answer is put in by the defendant within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial as to all the defendants, may apply for judgment, at any special term, upon due notice of such of the defendants as have appeared in the action, and without putting the cause on the calendar. The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and, if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And in all foreclosure cases, the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time

of filing the complaint, as required by § 132 of the Code of Procedure.

RULE 72. Judgment for sale of mortgaged premises. Surplus moneys. Report of sale.—In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far at least as the same can be ascertained from the mortgage, shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff, for principal, interest and costs, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff or any other party may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that, out of the proceeds of the sale, he pay to the plaintiff, or his attorney, the amount of his debt, interest and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into possession of the premises on production of the deed.

All surplus moneys arising from the sale of mortgaged premises under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York, to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of, in pursuance of the judgment. The referee to be appointed in foreclosure cases shall be selected by the court, and the court shall not appoint as such referee a person nominated by the party to the action or his counsel.

RULE 73. Sale of lands in the city of New York. Sale of lands out of the city.—Where lands in the city of New York are sold under a decree, order or judgment of any court, they shall be sold at public vendue, at the Merchants' Exchange Sales-room, No. 111 Broadway, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed. The notice of the sale of lands lying in any of the cities of this State in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city, for three weeks immediately pre-

vious to the time of sale, at least twice in each week. When lands in any other part of the State are directed to be sold at auction, notice of the sale shall be given for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution.

RULE 74. *How sheriff is to sell.*—Where mortgaged premises or other real estate directed to be sold consist of several distinct lots or parcels, which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff, or other person conducting the sale, to sell the same in separate lots or parcels, unless otherwise specially directed by the court. But if the sheriff or other person is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.

RULE 75. *Mortgage must be filed or recorded.*—Whenever a sheriff or referee sells mortgaged premises, under a decree or order or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage in the office of the clerk, unless such mortgage has been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded, at full length, in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and if filed with the clerk, he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to any case where the mortgage appears, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

RULE 76. *Claims for surplus money.*—On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice stating that he is entitled to such surplus moneys, or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. Every party who appeared in the cause, or who shall have filed such notice with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to

the usual notices of subsequent proceedings relative to such surplus. But if such claimant has not appeared or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant, at his place of residence, as stated in the notice of his claim.

RULE 77. *Partition of lands held in common.*—Where several tracts or parcels of land lying within this State are owned by the same persons in common, no separate action for the partition of a part thereof only shall be brought without the consent of all the parties interested therein; and if brought without such consent, the share of the plaintiff may be charged with the whole costs of the proceeding. And when infants are interested, the petition shall state whether or not the parties own any other lands in common.

RULE 78. *Reference as to title where no defence interposed.*—Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the bill or petition, and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

RULE 79. *Order for reference. Sale in partition.*—Where the whole premises of which partition is sought are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled, is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred, to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that if he arrives at the conclusion that the sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and, in such a case, that he also ascertain and report whether any creditor, not a party to the suit, has a specific lien, by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in that

portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. He shall also, if requested by the parties who appear before him on such reference, ascertain and report the amount due to any creditor not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all parties interested in the proceeds thereof on such sale.

RULE 80. *Staying sale in foreclosure or partition.*—No order to stay a sale under a judgment in partition, or for the foreclosure of a mortgage, shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.

RULE 81. *Moneys brought into court to be paid to the county treasurer. Where deposited.*—All moneys brought into court by order of this or any other court shall be paid to the county treasurer of the county in which the action is triable, unless the court shall otherwise direct. And all bonds, mortgages, and other securities upon real estate heretofore required to be taken in the name of the clerk of the court of appeals, shall, except as otherwise provided by law, be taken to the treasurer of the county where such fund belongs, or such other county treasurer as this court shall direct. And all moneys received by the county treasurer, under and by virtue of any law vesting him with the funds or securities belonging to any of the suitors, in any court of this State, shall be deposited by the said county treasurer, in his name of office, in the New York Life Insurance and Trust Company, the United States Trust Company, or in such bank or trust company as the court for the district shall from time to time direct, as a deposit bank, unless the order or judgment under which such moneys are brought into court shall direct such moneys to be deposited in some other bank or company.

RULE 82. [79.] *Accounts of county treasurer. County treasurer to report annually.*—The accounts of the county treasurers, with re-

spect to moneys or securities received by them under the foregoing rule, or by virtue of any order of any court of this State, with the banks and other companies in which moneys are directed to be deposited, shall be kept in such manner that, in the cash books of the banks and other companies, and in the bank books of the said treasurers, it shall appear in what particular suit or on what account the several items of money credited or charged were deposited or paid out. The said county treasurer shall, at the first general term of this court, for the district in which such treasurer resides, in each year make a report to said court, containing a statement of his accounts, and of the funds and securities under his control, on the first day of January, which statement shall show the amount in his hands uninvested, and the times when received, and the suit or matter in which the same was paid in, constituting the balance in deposit in banks and other companies; and also all stocks, bonds and mortgages and other investments, for the benefit of suitors or otherwise. The court to which such report shall be made shall cause the same to be examined by some suitable and proper person, to be appointed by them. The person so appointed shall forthwith proceed to examine the account and statement, with the accounts in banks and in other companies, and with the accounts and securities in the office of such treasurer. He shall have the power to summon witnesses before him, if necessary, to be examined with respect to such accounts. He shall report whether such accounts have been correctly kept and are truly stated, and shall, on or before the first day of the next ensuing general term in such district, deliver to the court of such district by which he shall be appointed, or one of the justices thereof, his report upon the matters so referred.

RULE 83. Orders for paying moneys out of Court. Accounts with trust companies.—Orders upon the banks or other companies for the payment of moneys out of court shall be made payable to the order of the person entitled thereto, or of his attorney duly authorized, and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. When moneys are deposited in the New York Life Insurance and Trust Company, or the United States Trust Company, to the credit of the county treasurer, the entry of such deposit, both in the books of the company and in the accounts of the county treasurer with the company, shall contain a short reference to the title of the cause or matter in which such deposit is directed to be made; and specifying also the time from which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit. The secretary of the company shall transmit to the justices holding the first general term for the first district, in January in each year, a statement of the accounts of the said county treasurer, and to

the justices holding the first general term in the other districts, a statement of the accounts of the county treasurer in each district, showing the amounts standing to his credit on the first day of January, including the interest or accumulation on the sums deposited to the credit of each cause or matter. In every draft upon the Trust Company by the county treasurer, for moneys deposited with the said company or for the interest or accumulation on such moneys, the title of the cause or matter on account of which the draft is made, and the date of the order authorizing such draft, shall be stated; and the draft shall be made payable to the order of the person or persons entitled to the money, or of his or their attorney, who is named in the order of the court authorizing such draft. And to authorize the payee or indorsee of such draft to receive the money thereon from the Trust Company, the same shall be accompanied by a certified copy of the order of the court authorizing such draft, countersigned by the justice by whom such order was made. But where periodical payments are directed to be made out of a fund deposited with such company, the delivery to the secretary of the company of one copy of the order authorizing the several payments shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order.

RULE 84. *Gross sum, in payment of life-estates, how ascertained.*—Whenever a party, as a tenant for life, or by the courtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum, during the probable life of such person, according to the Portsmouth or Northampton tables.

RULE 85. *Fees on executing commission of lunacy.* *Committee may pay taxed costs.*—On the execution of a commission of lunacy, &c., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to the same allowance which is made by law to commissioners to make partition or admeasure dower. And for drawing the inquisition and process and serving notices, when no attorney is employed, they shall have the fees to which an attorney would be entitled for the same services. The committee of a lunatic, idiot or drunkard may pay to the petitioner on whose application the commission was issued, or to his attorney, the costs and expenses of the application, and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and ex-

penses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered, provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same out of the estate in his hands without a special order of the court directing such payment.

RULE 86. *Action for divorce or separation. Complaint for divorce.*—When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the court to which application is made for judgment shall order a reference to take proof of all the material facts charged in the complaint.

The court shall in no case order the reference to a referee nominated by either party.

And, when the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed; and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and also where, at the time of the offence charged, the defendant was living in adulterous intercourse with the person with whom the offence is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and the complaint containing such averments be verified by the oath of the plaintiff, in the manner prescribed by the 157th section of the Code,—judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced, stating the above facts.

RULE 87. *Reference in suit to annul marriage.*—To obtain an order of reference, if the complaint seeks to annul a marriage on the ground that the party was under the age of legal consent, an affidavit must be produced showing that the parties thereto have not freely cohabited for any time as husband and wife after the plaintiff had attained the age of consent. If the complaint seeks to annul the marriage on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show by affidavit that there has been no voluntary cohabitation between the parties as man and wife; and, if it seeks to annul a marriage on the ground that the plaintiff was a lunatic, an affidavit must be produced showing that the lunacy still continues, or the plaintiff must show by his affidavit that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

RULE 88. *Plaintiff may be examined on reference.*—On a reference to take proof of the facts charged in a complaint for separation or limited divorce, the examination of the plaintiff on oath may be taken as to any cruel or inhuman treatment, alleged in the complaint, which took place when no witnesses were present who are competent to testify to the facts on such reference.

RULE 89. *Defence in action for divorce, &c.*—The defendant, in the answer, may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

RULE 90. *Questioning legitimacy of children.*—On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate shall be distinctly made in the complaint. If a reference is ordered, proofs shall be taken upon the question of legitimacy, as well as upon the other matters stated in the complaint; and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

RULE 91. *Sentence of nullity or decree for divorce by default. Pleadings or testimony not to be published. Judgment for divorce.*—No sentence or decree of nullity declaring void a marriage contract, or decree for a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issue, or upon the coming in of the proofs, at a special term of the court; but where no person appears on the part of the defendants, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of this court with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party, or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No judgment in an action for a divorce shall be entertained except upon the special direction of the court.

RULE 92. *Receiver of debtor's estate. When allowed his costs.*

May sell doubtful claims at auction.—Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands, and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

RULE 93. Suits pending. Cases not provided for. When rules take effect.—All actions depending on the first day of July, 1848, may be conducted according to the rules of the supreme court, adopted in July, 1847, so far as the same are applicable.

In cases where no provision is made by statute, or by these rules, the proceedings shall be according to the customary practice, as it has heretofore existed in the court of chancery and supreme court in cases not provided for by statute or the written rules of the court.

These rules shall take effect on the first day of October, 1858.

A TABLE

Corresponding with the Northampton tables, referred to in the preceding 84th rule of court, showing the value of an annuity of one dollar, at six per cent., on a single life, at any age from one year to ninety-four, inclusive.

Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.
1	10.107	25	12.063	49	9.563	73	4.781
2	11.724	26	11.992	50	9.417	74	4.565
3	12.348	27	11.917	51	9.273	75	4.354
4	12.769	28	11.841	52	9.129	76	4.154
5	12.962	29	11.763	53	8.980	77	3.952
6	13.156	30	11.682	54	8.827	78	3.742
7	13.275	31	11.598	55	8.670	79	3.514
8	13.337	32	11.512	56	8.509	80	3.281
9	13.335	33	11.423	57	8.343	81	3.156
10	13.285	34	11.331	58	8.173	82	2.926
11	13.212	35	11.236	59	7.999	83	2.713
12	13.130	36	11.137	60	7.820	84	2.551
13	13.044	37	11.035	61	7.637	85	2.402
14	12.953	38	10.929	62	7.449	86	2.266
15	12.857	39	10.819	63	7.253	87	2.138
16	12.755	40	10.705	64	7.052	88	2.031
17	12.655	41	10.589	65	6.841	89	1.882
18	12.562	42	10.473	66	6.625	90	1.689
19	12.477	43	10.356	67	6.405	91	1.422
20	12.398	44	10.235	68	6.179	92	1.136
21	12.329	45	10.110	69	5.949	93	0.806
22	12.265	46	9.980	70	5.716	94	0.518
23	12.200	47	9.846	71	5.479		
24	12.132	48	9.707	72	5.241		

RULE FOR COMPUTING THE VALUE OF THE LIFE-ESTATE OR ANNUITY.

Calculate the interest at six per cent. for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life-estate of such person in said sum.

EXAMPLES.

Suppose a widow's age is 37, and she is entitled to dower in real estate worth \$350 75. One third of this is \$116 91 $\frac{2}{3}$. Interest on \$116 91, one year at six per cent. (as fixed by 84th rule), is \$7 01. The number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years and 035-1000 parts of a year, which, multiplied by 7.01, the income for one year, gives \$77 35 and a fraction as the gross value of her right of dower.

Suppose a man whose age is 50 is tenant by the curtesy in the whole of an estate worth \$9,000. The annual interest on the sum, at six per cent., is \$540. The number of years' purchase which an annuity of one dollar is worth at the age of 50, as per table, is 9 years and 417-1000 parts of a year, which, multiplied by 540, the value of one year, gives \$5,085 18 as the gross value of his life-estate in the premises or the proceeds thereof.

NOTE.—The values in this table are calculated on the supposition that the annuities are payable yearly; if payable half-yearly, one fifth of a year's purchase should be added to those values.

SUPREME COURT, GENERAL TERM.

NEW YORK, April 14th, 1856.

Rules in regard to Moneys awarded to Unknown Owners.

1. Whenever any person shall claim any money awarded to unknown owners on the opening, widening, altering, improving or laying out of any street, avenue, square, or public place, he shall cause notice of his intention to apply to the court for such moneys to be published in one of the daily newspapers in this city, at least once a week for four weeks; and shall serve notice of such intention on the mayor of the city and the counsel to the corporation of the city, at least fourteen days before such application. The court at special term, or the judge at chambers, may hear the application, and may hear the proofs or refer the matter to a referee to hear and examine into the matter, and to report the substance of the

proofs, with his opinion. The applicant shall furnish to the court or referee an abstract of title for at least twenty years prior to the award, and carried down to the time of the examination; and also produce the originals or verified copies of all deeds and wills referred to in the abstract, unless the court or judge, on proof that the same cannot be furnished, shall authorize other proof to be received in place of such originals or copies; and shall also furnish a certificate of search for mortgages and conveyances against the persons named in the abstract of title, made by a searcher in the register's office, or by some other person experienced in making such searches, and shall furnish his own affidavit, or that of his agent, or of some other person likely to be acquainted with the truth, to the effect that, according to his best knowledge, information and belief, there were no mortgages, conveyances, judgments or liens of any kind on the property to which the award was made, at the time of the award, and of the payment of the money to the officer then holding the money for the unknown owners, except such liens (if any) as may be specially mentioned in such affidavit. The maps of awards and assessments, or extracts from them, so far as relates to the lots in question, shall also be produced to the court, or judge, or referee. Whenever any money shall be paid to the clerk, or to the chamberlain or county treasurer, for unknown owners, such officer shall enter in his books of account a memorandum showing the title of the matter in which payment is made, and the number of the lot or lots on the map of awards or assessments to which the award is made.

2. No application will be heard in regard to the disposition of moneys awarded to unknown owners, until such moneys shall have been actually paid.

3. Every petition for the payment of such moneys shall be verified under oath; shall set forth a statement of the title and the grounds of the claim; and shall also state the names and residences of all persons, if any, whom the petitioner knows, or has been informed, or believes, to be claimants of such moneys or of any part thereof, or in any manner or in any degree interested or claiming to be interested therein.

4. Ten counselors-at-law, to be named by the presiding justice, with the concurrence of one or more of the other judges, shall be appointed referees, to one of whom such application shall be referred; and no application shall be referred except to one of the persons so to be named.

5. The referee, before proceeding in the reference, shall require proof of the service of notice of the reference upon all persons named in the petition as interested, or as claimants, and if, upon the reference, the referee shall consider that other persons should be notified, he shall require notices to be served upon them. If any such persons are infants, guardians must be appointed as in ordin-

any actions; and if any are absent, non-resident, or cannot be found, special application must be made to the court for direction in the premises.

6. The referee shall require a full and complete abstract of the title to be furnished to him, and which he shall verify for such length of time as he may deem advisable, together with full, complete and original returns of searches for mortgages, conveyances, and all other liens whatever, affecting the title of the property, and such affidavits also as he may deem proper. And he shall annex to and return with his report all such papers, together with the proofs of service of notices upon adverse claimants, and all testimony taken before him.

7. Notice of hearing, upon the report of the referee, shall be served upon all persons who appeared upon the reference, and proof shall be furnished to the court of the service of such notice.

*Position on Calendar of Causes called and Passed in Courts in
New York City.*

When a cause placed upon a calendar of a court of record in the city of New York shall be regularly called and passed, without a postponement by the court for good cause shown, it shall thenceforth take its place on the same or any future calendar as if the date of the issue were the time when it was thus passed. (Laws of 1849, p. 708, s. 16.)

In the case mentioned in the last section, it shall be the duty of the party placing a cause upon the calendar for a subsequent term, to state the date of the issue, as above prescribed; and if he omit to do so, by reason whereof the issue retains its priority on the calendar, the court, on the application of the adverse party, or of its own motion, may strike the cause from the calendar. (*Id.* s. 17.)

SUPREME COURT RULES, FIRST DISTRICT.

SPECIAL CIRCUIT CALENDAR.

At any Circuit, until further orders, any causes belonging to either of the following classes may be placed on a special Circuit Calendar, unless the trial is likely to occupy more than one hour :

1. Where the action is on contract, and the answer merely denies the allegations in the complaint, without setting up any new matter.

2. Where the action is on contract, and new matter is set up in the answer, and there shall be reason to believe that the defence is made only for the purpose of delay ; or, where it shall appear, by affidavit, that the cause can be tried in an hour.

To entitle the cause to be placed on such calendar, the plaintiff's attorney must give a notice of four days, to be heard before a judge at chambers, that he will move to have the cause placed on such calendar ; and if the motion be granted, the cause may be heard on any subsequent Friday.

If the motion be founded on the belief that the defence is for delay, or that the cause can be tried in an hour, affidavits must be served at the time of notice.

The plaintiffs attorney must deliver to the clerk of the circuit a like notice, one day before such Friday, containing also the number of the cause on the general circuit calendar.

If the cause shall actually occupy more than one hour on the trial, the trial may be suspended, at the discretion of the court, and the cause be put down at the foot of the calendar.

Preferred Causes.

Causes which, under existing laws, are preferred, take their preference in the following order on the calendar :

1. Criminal actions.
2. Cases of probate in which the appeal prevents the issue of letters testamentary or of administration.
3. Appeals in which the sole plaintiffs or defendants are executors or administrators.
4. All other preferred causes.

Any party claiming a preference must so state in his notice of argument to the opposite party and to the clerk, and must also state the ground of such preference, so as to show to which of the above classes the case belongs.

The clerk will place the preferred causes at the head of the calendar, in the order above prescribed.

A preferred cause being once passed without reservation, will take its place on subsequent calendars, without preference.

Mortgage or Sale by Religious Corporation.

MARCH 24, 1862.—*Ordered*, That in all future applications made to this court by religious corporations for leave to mortgage or sell their real estate, it shall be necessary to submit, with the petition to the court, a statement specifying what property had been sold by the corporation under any order of the court at any time within five years next preceding such application, and also showing the object for which sales, if any, were ordered, and the disposition actually made of the proceeds of any sale. Such statement shall be verified by one of the officers of the corporation.

Sales by Order of the Court.

MARCH 25, 1862.—*Ordered*, That all sales to be made by virtue of or under any order, judgment, or other proceeding of this court, after the first day of May, 1862, may be noticed for and made at the Merchants' Exchange Sales-room, No. 111 Broadway, and that any order heretofore made, so far as it conflicts with this order, is vacated.

But nothing in this order shall apply to any notice of sale heretofore published; and where any notice of sale has been given for a day subsequent to the first day of May, 1862, at the Merchants' Exchange, the same may be adjourned to the room above designated.

Trial Fees.

MAY 5, 1862.—Trial fees for causes heard at general term will hereafter be collected on the argument, to be paid in all cases by the moving party.

Substitution of Attorney.

Ordered, Whenever a consent is filed with the clerk of this court for the substitution of an attorney or the discontinuance of an action, the clerk may enter in the minutes of the court the substitution of the attorney or the discontinuance of the action, without any order of the judge therefor.

Special Term and Motions.

After the October term of 1859, all motions at special term at chambers must be noticed for the first and third Mondays in each term, and for no other time. Such motions will be heard in order on those and the succeeding days, unless otherwise ordered by the judge holding the term, until disposed of. Motions must be noticed for twelve o'clock noon. *Ex-parte* business will be attended to between ten and twelve o'clock each day.

Ordered, That the following classes of motions shall have preference, at chambers, in the order herein mentioned, and that all orders heretofore made in relation thereto be and are hereby vacated.

1. Motions to place causes on special calendars.
2. Motions for extra allowance.
3. Motions for judgments in foreclosure cases where no answer is put in.
4. Motions for reference and for commissions to take testimony.
5. Motions to discharge from imprisonment.
6. Motions to punish for contempt.
7. All other motions to which preference is given by the statute.
8. The general call of the calendar.

Admission of Attorneys.

MAY 12, 1862.—*Ordered*, That a committee be appointed at each of the May and November terms, to whom the matters shall be referred for such examination and inquiry. The committee are to report on or before the third Monday of the term. Where a certificate of good character is submitted, the same should state that the party signing the same is acquainted with the character of the applicant, and knows it to be good.

NEW YORK SUPERIOR COURT RULES.

ADOPTED JANUARY 18TH, 1851.

RULE 1. *General and special terms, when held.*—The general and special terms of the court will be held on the first Mondays of January, February, March, April, May, June, October, November, and December, in each year, and will continue until the last Saturday of such months respectively.

RULE 2. *Business at general term; time of opening.*—At the general terms, the court will hear appeals and enumerated motions. The general term will open at eleven o'clock A. M.

RULE 3. *Trial term.*—The special term will consist of two or more trial terms, held by two or more justices, severally, and a term held by one justice, which will be designated the special (or equity) term. For the trial terms the clerk will prepare a calendar for each branch of the court, containing the issues of fact to be tried by a jury. Such calendars will be called and regulated by the justice presiding in each court. The trial terms will open at eleven o'clock A. M.

RULE 4. *Special term.*—For the special term the clerk will prepare a calendar, containing, first, the issues of law noticed for argument at such term, and, second, all issues of fact noticed for trial, which are designated on the notes of issues as causes not requiring to be tried by a jury by section 253 of the Code of Procedure, or in which a jury trial is waived. The special term will open at ten o'clock A. M., and the first hour will be devoted to the giving of judgment in undefended causes, and the hearing of litigated non-enumerated motions. The calendar will be taken up each day at eleven o'clock A. M.

RULE 5 (as amended January, 1862). *Non-enumerated motions.*—At ten o'clock in the morning, daily, except Sundays, New Year's day, Good Friday, Thanksgiving and Christmas days, the Fourth of July, and the days of annual election, special terms shall be held

at chambers to hear non-enumerated motions and applications required to be made in open court; also for the trial of causes which the parties and the justice sitting in such term may consent to have tried before him without a jury, and giving judgment therein; and also for giving judgment in actions under chapter one, title eight, second part of the Code. And as many special terms for such purposes may be held simultaneously as there may be justices attending to hold the same.

Where the notice of a motion or application states that it will be made at chambers, or at a special term at chambers, it shall be heard there only, unless the parties otherwise agree; and either party may there take the other's default therein.

RULE 6. *Attendance of justices at chambers.*—The justices designated to hold the general terms will attend at chambers daily, during their respective terms, from ten to eleven A. M., to dispose of *ex-parte* applications and of non-enumerated motions. All applications for *ex-parte* orders, and for judgments upon failure to answer, during the general terms, must be made before eleven o'clock A. M.

RULE 7 (as amended October, 1858). *Appeals from orders on non-enumerated motions.*—Appeals from all orders made on non-enumerated motions will be heard on each Saturday during the general terms, at eleven o'clock A. M. Such appeals may be noticed for that time. Appeals from orders sustaining or overruling demurrers will also be then heard, and will be heard in their order on the general term calendar. Six copies of the appeal papers must be furnished to the court.

RULE 8. *Motion to set aside verdict as against evidence.*—A party intending to move to set aside a verdict as against the evidence, must obtain from the justice who tried the cause an order staying the proceedings for that purpose. Such a motion will not be entertained unless the stay of proceedings be obtained and served within four days after the entry of the judgment by the clerk, or before the insertion of the costs by the clerk in the entry of the judgment. The court, by order, may permit the judgment to be entered and collected, without prejudice to a motion to set aside the verdict; and may impose such terms on each party in respect thereof as to the court may seem meet.

RULE 9. *Case and exceptions on motion to set aside verdict as against evidence.*—The party moving to set aside a verdict as against evidence must prepare a case, and procure the same to be settled in the usual manner. If the party making the case intends to appeal from the judgment, when entered on the verdict, because of

errors of law alleged to have occurred at the trial, or in the direction for judgment, he must present such alleged errors in the case made for setting aside the verdict. If the errors complained of were excepted to in due season, when they occurred, the case may be turned into exceptions, as of course, in the event of the application to set aside the verdict being denied.

RULE 10. *Hearing on motion to set aside verdict.*—The motion to set aside the verdict on the case when settled, must be brought on, on the usual notice, at the special term. No alleged errors of law presented by such case will be considered at the special term, unless by the express directions of the justice before whom the cause was tried.

RULE 11. *Appeal from order granting or refusing a new trial.*—If either party appeal from an order of a justice granting or refusing a new trial on such case, the appeal may be brought on before the general term, on the usual notice. If the order refuse a new trial, and there be alleged errors of law contained in the case on which the motion was made, the appeal from the judgment in respect to such errors of law must be brought on and argued at the same time with the appeal from the order refusing a new trial, at the special term.

RULE 12. *Costs on appeal.*—The costs, on an appeal to the general term from a judgment, as well as from an order granting or refusing a motion to set aside a verdict as against evidence, when allowed by the court, shall be the costs prescribed in subdivision six of section three hundred and seven of the amended Code, together with the expenses specified in section three hundred and eleven. But where an appeal from such order is heard at the same time with an appeal from the judgment in the cause, the court may, in its discretion, give costs on the former appeal, as if it were a motion at special term.

RULE 13. *Motion for re-hearing before referees.*—The party who moves for a re-hearing or review of a cause or matter decided by a referee or referees shall procure and furnish to the court a special report of the referee or referees, setting forth distinctly the facts found on the reference, and his or their decision upon the points of law arising in the cause.

RULE 14. (*Adopted December, 1851.*) *Notes of issue.*—That all notes of issue hereinafter filed with the clerk, in causes which have once been on the calendar for trial or argument, shall specify the number of the cause on the last preceding calendar on which it was entered, and the date of such calendar. And every note of issue shall state whether the cause is to be placed on the calendar

of the general term, the special term, or the trial term. No cause shall be entered by the clerk on either calendar, unless the note of issue conforms to this rule.

RULE 15. (*Adopted March 6, 1852.*) *Notes of issue.*—That all notes of issue hereinafter filed with the clerk, in causes which have once been on the calendar for trial or argument, shall specify the number of the cause on the last preceding calendar on which it was entered, and the date on such calendar. And every note of issue shall state whether the cause is to be placed on the calendar of the general term, the special term, or the trial term. No cause shall be entered by the clerk on either calendar, unless the note of issue conforms to this rule.

RULE 16. (*Adopted March 19, 1853.*) *Notes of issue.*—That all notes of issue hereafter, for the general, special, and trial terms of this court, must be filed with the clerk eight days before the commencement of the first day of the succeeding term.

RULE 17. (*Adopted March 10, 1855.*) *Inquests.*—That when a cause is placed on the day calendar for trial, the plaintiff may, at the opening of the court each day, take an inquest therein, in any case the court will consent to try, without the intervention of a jury, though an affidavit of merits may have been filed, unless the defendant shall appear and state that a defence is intended to be made.

RULE 18. (*Adopted April 11, 1857.*) *Filing papers. Entering orders. Motion for judgment.*—The attorneys of the parties must file immediately every paper read by them on a motion.

Every order hereafter entered must specify the papers on which it was granted or opposed; and the clerk is directed not to enter any order unless such papers are exhibited to him and filed, or unless they have been previously filed.

Either party, at the time of giving notice of trial for the special or trial term, may also give notice that he will move, on the first day of term, for judgment upon the pleadings, or upon the pleadings with such admission on his part as he may specify; and may thereupon bring on the action to be tried, and move for such judgment as he may be entitled upon the pleadings, with or without such admission.

RULE 19. (*Adopted 19th October, 1861.*) *False defences. Short causes.*—In actions on contract, where there is reason to believe that the defence is interposed for the purpose of delay, and that the trial will not occupy more than one hour, the plaintiff may apply by motion at chambers or special term, on a notice of four

days, to have the issue placed upon a special calendar for trial (serving with such notice any affidavits or papers he may wish to use on the motion, which have not already been served); and the same may be so ordered in the discretion of the justice before whom the motion shall be made.

If such motion be granted, the cause will be entered on a special calendar to be made by the clerk, on receiving a note of the issue specifying the number of the cause on the general trial calendar, and the date of the order directing it to be placed on such special calendar. Such note of issue to be filed with the clerk four days before the day on which the cause shall be so entered.

The special calendar will be called on the second and last Friday of each trial term, in part No. 1, for trials, by the justice there presiding, and the causes may be tried in either part as may be directed by such justice.

If the trial of the cause shall occupy more than one hour, the trial may be suspended at the discretion of the court, and the cause be placed at the foot of the general trial calendar.

RULE 20. Regulations as to the calendars.—Causes may be *generally reserved* by a written consent of the attorneys, filed at any time before the case is on the day calendar. Cases so reserved may afterwards be placed upon the day calendar, on the application of either party to the judge at chambers, provided two days' previous notice of such application be given to the adverse party.

All causes marked "Off for the Term," shall have priority at the succeeding term, and will be placed in their order at the head of the calendar therefor.

Causes passed, or run down, will be placed upon the calendar for the succeeding term, as of the date of issue when thus passed or run down.

COURT OF COMMON PLEAS

FOR THE CITY AND COUNTY OF NEW YORK.

RULES ADOPTED DECEMBER, 1863.

Regulation of Calendar—Short causes.

1. The general calendars for the trial of jury cases, and cases to be tried *by the court without a jury*, for the year 1863, having been called through, will be re-numbered for 1864; and those cases only in which the law relative to stenographers shall have been complied with, on or before the 24th instant, will be continued on the calendars. Notes of issue in new cases not on the present general calendar must be filed on or before the 24th instant.

2. Causes may be *generally reserved* by a written consent of the attorneys, filed at any time *before* the case is on the day calendar. Cases so reserved may afterwards be placed upon the day calendar, on the application of either party to the judge *at chambers*, provided two days previous notice of such application be given to the adverse party.

3. All causes marked "*Off for the term*," shall have priority at the succeeding term, and will be placed at the head of the calendar therefor.

4. Fifteen cases will be placed on each day calendar, and no calendar will be made for Saturdays.

5. At the general terms, in appeal cases arising in *this court*, the parties may, by consent, reserve the argument until the second week in term, when all so reserved will be called in their order on the calendar. But in appeals from the marine and justices' courts no such reservation will be allowed, and counsel therein must be prepared for the argument when the appeal is reached in its order.

6. In any action on contract, where there is reason to believe that the defence is interposed for delay, and that the trial will not occupy more than one hour, the plaintiff may, upon a notice of four days, apply *at chambers* to have the cause placed upon the special calendar for short cases, and which will be made up for the last Friday in each trial term.

The notice must be accompanied by the affidavits (if any) upon which the motion will be founded.

If the motion be granted, the order to that effect shall forthwith be delivered to the clerk, with a written notice specifying the number of the cause on the general calendar.

Should the trial occupy more than one hour, it may be suspended, in the discretion of the judge holding the court, and the cause will thereupon be placed at the foot of the general calendar, unless otherwise specially ordered.

RULE ADOPTED MARCH 22, 1851.

Review of Questions of Practice, &c.

For the purpose of regulating the review of questions of practice decided by a single judge, the court adopts the following rule:

Upon the decision of motions made before a single judge at chambers or at special term, in cases in which no appeal is allowed by section 349 of the Code, the judge may, if he deem the question of such importance and doubt as to render a review by the general term proper, give a certificate thereof; and the party desiring such review shall, within six days after the decision of such motion, procure such certificate, and serve a copy thereof, with a notice of hearing for the next general term for which the same can be noticed; and thereupon such motion shall be brought on and submitted for review, on written points, to be shown to the opposite counsel, and then handed to the court.

Such certificate shall not operate as a stay of proceedings, unless such stay of proceedings be expressly ordered.

RULE ADOPTED MAY 2, 1857.

Appeals from orders to be submitted on certified copies of the papers.

Ordered, that appeals to the general term from orders made in motions at special terms and chambers be submitted upon certified copies of the papers used on the motion, instead of the original papers.

RULE ADOPTED SEPTEMBER 28, 1857.

Argument of appeals from Marine and District Courts.

Appeals from the marine and district courts shall hereafter, and until further order of this court, be heard orally at the general term appointed for the submission thereof.

The parties will be confined on the argument to a brief statement of the facts and points involved, and the authorities relied on, unless the court shall otherwise direct.

Assignee's bond for benefit of creditors.

Ordered, that the bond required to be given by an assignee, under the act of April 13th, 1860, respecting voluntary assignments for the benefit of creditors, must specify the place of residence of each surety named therein.

At the time of presenting it for approval, it must be accompanied by an affidavit showing the nominal value, and also the actual value of the property assigned; and no bond will be hereafter approved until these requirements are complied with.

Referees in supplementary proceedings.

Owing to the numerous complaints which have been made respecting referees appointed upon the nomination of parties applying for the examination of judgment debtors, in proceedings supplementary to execution,—

Ordered, that hereafter referees in such proceedings must be selected from the following-named persons:

MICHAEL ULSHOEFFER,
EDWARD E. COWLES,
BARTHOLOMEW O'CONNER,
MALCOLM CAMPBELL,
JOHN S. PATTERSON,

THADDEUS H. LANE,
RICHARD S. CUMMING,
WM. BLOOMFIELD,
JOSEPH O. BROWN,
WM. SINCLAIR.

TERMS OF THE SUPREME COURT,

FROM JULY 1, 1864, TO JANUARY 1, 1866.

FIRST JUDICIAL DISTRICT.

General Terms.

Third Monday of September, 1864, held by Leonard, Clerke and Sutherland.

First Monday of November, 1864, held by Leonard, Barnard and Sutherland.

First Monday of February, 1865, held by Ingraham, Clerke and Sutherland.

First Monday of May, 1865, held by Ingraham, Barnard and Clerke.

Third Monday of September, 1865, held by Ingraham, Leonard and Sutherland.

First Monday of November, 1865, held by Ingraham, Leonard and Barnard.

Special Terms for Enumerated Motions.

October, 1864, held by Judge Clerke.

November, 1864, held by a Judge from another district.

December, 1864, held by Judge Clerke.

January, 1865, held by Judge Clerke.

March, 1865, held by a Judge from another district.

April, 1865, held by Judge Sutherland.

May, 1865, held by a Judge from another district.

June, 1865, held by Judge Leonard.

October, 1865, held by Judge Clerke.

November, 1865, held by Judge Sutherland.

December, 1865, held by Judge Ingraham.

Oyer and Terminer and Circuit Courts.

October, 1864, Part 1, and Oyer and Terminer, held by Judge Barnard. Part 2, held by a Judge from another district. Part 3, held by Judge Sutherland.

November, 1864, Part 1, held by a Judge from another district. Part 2, held by a Judge from another district.

December, 1864, Part 1, and Oyer and Terminer, held by Judge Leonard. Part 2, held by a Judge from another district. Part 3, held by a Judge from another district.

January, 1865, Part 1, and Oyer and Terminer, held by Judge Barnard. Part 2, held by Judge Leonard.

February, 1865, Part 1, held by a Judge from another district. Part 2, held by Judge Leonard.

March, 1865, Part 1, held by Judge Clerke. Part 2, held by a Judge from another district.

April, 1865, Part 1, and Oyer and Terminer, held by Judge Ingraham. Part 2, held by Judge Clerke. Part 3, held by a Judge from another district.

May, 1865, Part 1, held by Judge Leonard. Part 2, held by a Judge from another district.

June, 1865, Part 1, held by Judge Sutherland. Part 2, held by Judge Barnard. Part 3, held by Judge Clerke.

October, 1865, Part 1, and Oyer and Terminer, held by Judge Leonard. Part 2, held by Judge Barnard. Part 3, held by Judge Sutherland.

November, 1865, Part 1, held by a Judge from another district. Part 2, held by a Judge from another district.

December, 1865, Part 1, and Oyer and Terminer, held by Judge Sutherland. Part 2, held by a Judge from another district. Part 3, held by Judge Barnard.

Where two circuits are to be held at the same time, the odd numbers will be placed on the calendars of Part 1, and the even numbers on the calendars of Part 2. When Part 3 is held, the reserved and set down causes will be placed on the calendar for that part, without regard to numbers.

Special Terms for Motions and Chamber business.

July, 1864, held by Judge Barnard.

August, 1864, held by Judge Clerke.

September, 1864, held by Judge Sutherland.

October, 1864, held by Judge Leonard.

November, 1864, held by Judges holding General Term.

December, 1864, held by Judge Barnard.

January, 1865, held by Judge Ingraham.

February, 1865, held by Judge Barnard.

March, 1865, held by Judge Leonard.

April, 1865, held by Judge Barnard.

May, 1865, held by Judge Sutherland.

June, 1865, held by Judge Ingraham.

July, 1865, held by Judge Clerke.

August, 1865, held by Judge Sutherland.

September, 1865, held by Judge Barnard.

October, 1865, held by Judge Ingraham.

November, 1865, held by Judge Clerke.

December, 1865, held by Judge Leonard.

The Judge at Chambers will hold the same to and including the Saturday preceding the first Monday of the succeeding month.

All applications for orders and business at Chambers, must be made to the Judge assigned to hold that branch of the court.

SECOND JUDICIAL DISTRICT.

General Terms, by all the Justices.

Second Monday of February, at Brooklyn; of May, at Poughkeepsie; of September, at Newburgh; of December, at Brooklyn.

Circuit Courts and Courts of Oyer and Terminer.

Suffolk. First Monday of October, 1864, Justice Lott; fourth Tuesday of April, 1865, Justice Barnard; first Monday of October, 1865, Justice Lott.

Queens. Second Monday of April, 1865, Justice Lott. Second Monday of October, 1864, Justice Scrugham; 1865, Justice Scrugham.

Kings. Third Monday of January, 1865, Justice Barnard; second Monday of March, 1865, Justice Scrugham; second Monday of April, 1865, Justice Barnard; second Monday of June, 1865, Justice Lott; second Monday of October, 1864, Justice Brown; third Monday of October, 1865, Justice Scrugham; third Monday of November, 1864 and 1865, Justice Lott.

Richmond. Third Monday of April, 1865, Justice Lott; third Monday of November, 1864 and 1865, Justice Scrugham.

Westchester. At the Court House in White Plains. Third Monday of March, 1865, Justice Lott; first Monday of June, 1865, Justice Barnard; first Monday of September, 1864 and 1865, Justice

Barnard; fourth Monday of November, 1864 and 1865, Justice Scrugham.

Special Terms. At the Court House in White Plains. First Monday of February, 1865, Justice Scrugham; second Monday of July, 1865, Justice Barnard.

Putnam. Third Monday of June, 1865, Justice Scrugham; fourth Monday of October, 1864, Justice Barnard; 1865, Justice Lott.

Rockland. Third Monday of April, 1865, Justice Scrugham; third Monday of October, 1864 and 1865, Justice Barnard.

Orange. Second Monday of January, 1865, at Newburgh, Justice Barnard; second Monday of June, 1865, at Goshen, Justice Scrugham; third Monday of October, 1864, at Newburgh, Justice Lott; third Monday of October, 1865, at Goshen, Justice Lott.

Special Terms. At the Court House at Newburgh. First Tuesday of July, 1864, by Justice Brown; first Monday of August, 1864, by Justice Brown; first Monday of September, 1864, by Justice Brown; first Monday of October, 1864, by Justice Brown; first Monday of November, 1864, by Justice Brown; first Monday of April, 1865, by Justice Barnard; first Monday of August, 1865, by Justice Barnard.

Dutchess. Second Monday of March, 1865, Justice Barnard; first Monday of June, 1865, Justice Scrugham; first Monday of October, 1864, Justice Barnard; 1865, Justice Barnard; first Monday of December, 1864, Justice Brown; 1865, Justice Lott.

Special Terms. At the Court House in Poughkeepsie; first Monday of January 1865, by Justice Barnard; first Tuesday of July, 1864 and 1865, by Justice Barnard; first Monday of August, 1864, by Justice Barnard; first Monday of December, 1864 and 1865, by Justice Barnard.

Special Terms will also be held in the several counties, except in the county of Kings, at the times and places above appointed for holding Circuit Courts therein.

Kings. For the Hearing of Non-enumerated Motions. First Tuesday of January, 1865, Justice Scrugham; first Monday of February, 1865, Justice Barnard; first Monday of March, 1865, Justice Barnard; first Monday of April, 1865, Justice Lott; first Monday of May, 1865, Justice Barnard; first Monday of June, 1865, Justice Lott; second Monday of July, 1864, Justice Brown; 1865, Justice Scrugham; first Monday of August, 1864 and 1865, Justice Lott; first Monday of September, 1864 and 1865, Justice Lott; first Monday of October, 1864 and 1865, Justice Scrugham; first Monday

of November, 1864 and 1865, Justice Barnard; first Monday of December, 1864 and 1865, Justice Scrugham.

For the trial of Issues and the Hearing of Non-enumerated Motions. Second Monday of January, 1865, Justice Lott; fourth Monday of April, 1865, Justice Scrugham; fourth Monday of June, 1865, Justice Barnard; second Monday of November, 1864, Justice Brown; 1865, Justice Barnard.

THIRD JUDICIAL DISTRICT.

General Terms.

First Mondays of March, May and December, and third Monday of September in each year, held in Albany, by all the Justices.

Circuit Courts, Courts of Oyer and Terminer.

Columbia. Second Mondays of January and April, 1865, by Hogeboom; first Monday of September, 1864, by Ingalls, and 1865, by Miller.

Ulster. Second Monday of January, 1865, by Ingalls; fourth Monday of March, 1865, by Hogeboom; first Monday of October, 1864 and 1865, by Peckham.

Rensselaer. Fourth Monday of January, 1865, by Peckham, and May, 1865, by Ingalls; and first Monday of October, 1864, by Ingalls, and 1865, by Miller.

Albany. First Monday of February, 1865, by Hogeboom; third Monday of May, 1865, by Peckham; and second Monday of November, 1864, by Peckham, and 1865, by Ingalls.

Greene. Third Monday of February, 1865, by Ingalls; first Monday of June, 1865, by Miller; third Monday of November, 1864, by Miller, and 1865, by Hogeboom.

Schoharie. Third Monday of October, 1864 and 1865, by Miller; and third Monday of April, 1865, by Peckham.

Sullivan. Third Monday of October, 1864, by Peckham, and 1865, by Ingalls; and third Monday of May, 1865, by Miller.

Special Terms for Motions only. Last Tuesday of each month, at Albany.

FOURTH JUDICIAL DISTRICT.

General Terms.

First Tuesdays of January and May, at Schenectady; second Tuesday of July, at Plattsburgh; and first Tuesday of October, at Canton.

Special Terms, without Juries.

Fourth Tuesday of July, each year, at Malone; first Tuesday of August, at Ballston Spa; fourth Tuesday of June, at Schenectady, and first Tuesday of March, at Sandy Hill.

Circuit Courts and Courts of Oyer and Terminer.

Clinton. Third Tuesday of October, 1864, by Potter; 1865, by Bockes; first Tuesday of February, 1865, by Rosekrans; and first Tuesday of June, 1865, by James.

Essex. Fourth Tuesday of August, 1864, by Potter; 1865, by Rosekrans; second Tuesday of February, 1865, by Bockes.

Franklin. First Tuesday of September, 1864, by Bockes; 1865, by Rosekrans; first Tuesday of March, 1865, by James.

Fulton. Second Tuesday of October, 1864 and 1865, by Bockes; and first Tuesday of April, 1865, by James.

Montgomery. Third Monday of September, 1864, by Potter; 1865, by James; second Monday of May, 1865, by Rosekrans; and second Monday of January, 1865, by James.

Saratoga. Second Monday of September, 1864 and 1865, by Rosekrans; third Monday of May, 1865, by James; and third Monday of January, 1865, by Bockes.

Schenectady. Third Tuesday of October, 1864 and 1865, by Rosekrans; and second Tuesday of April, 1865, by Bockes.

St. Lawrence. Second Tuesday of October, 1864 and 1865, by Rosekrans; second Tuesday of June, 1864 and 1865, by Bockes; and third Tuesday of February, 1865, by James.

Warren. Fourth Tuesday of October, 1864, by Potter; 1865, by Bockes; third Tuesday of April, 1865, by Rosekrans.

Washington. Third Tuesday of September, 1864 and 1865, by Bockes; fourth Tuesday of January, 1865, by Rosekrans; and fourth Tuesday of May, 1865, by James.

FIFTH JUDICIAL DISTRICT.

General Terms.

First Tuesdays of January and April, fourth Tuesday of June, and first Tuesday of October, in each year, at Syracuse.

Circuit Courts and Courts of Oyer and Terminer.

Oneida. First Mondays of February and June, 1865, and second Monday of November, 1864 and 1865, by Bacon.

Lewis. Third Tuesday of April, 1865, by Morgan; and fourth Tuesday of October, 1864 and 1865, by Mullin.

Jefferson. Third Monday of October, 1864, by Morgan; 1865, by Mullin; second Monday of June, 1865, by Bacon; and first Monday of March, 1865.

Herkimer. Second Monday of December, 1864, by Morgan; 1865, by Bacon; and first Monday of May, 1865, by Morgan.

Onondaga. Third Monday of September, 1864 and 1865; fourth Monday of January, 1865, by Morgan; and of May, 1865, by Mullin.

Oswego. Second Monday of September, 1864, by Bacon; 1865, by Morgan; third Monday of May, 1865, by Bacon; and third Monday of January, 1865, by ———.

Special Terms.

Third Tuesday of November, 1864, Jefferson County; fourth Tuesday of August, 1864, Herkimer County; fourth Tuesday of October, 1864, Onondaga County; third Tuesday of December, 1864, Oswego County; third Tuesdays of January and September, 1865, Oneida County; second Tuesday of May, 1865, Lewis County; third Tuesday of March and November, 1865, Jefferson County; fourth Tuesday of August, 1865, Herkimer County; third Tuesday of April, 1865, Onondaga County; third Tuesday of February and December, 1865, Oswego County.

SIXTH JUDICIAL DISTRICT.

General Terms.

At the Court House in Binghamton, Broome County, fourth Tuesday of January; second Tuesday of May; second Tuesday of July; third Tuesday of November.

Special Terms, Circuit Courts and Courts of Oyer and Terminer.

At the Court House in Tompkins County, third Monday of January, 1865, Mason; third Monday of September, 1864, Parker; 1865, Balcom.

Cortland County, first Monday of January, 1865, Parker; third Monday of June, 1865, Balcom.

Chemung County, first Monday of February, 1865, Mason; first Monday of September, 1864, Mason; 1865, Parker.

Tioga County, first Monday of March, 1865, Balcom; first Monday of October, 1864, Campbell; 1865, Parker.

Broome County, third Monday of February, 1865, Balcom; last Monday of September, 1864, Campbell; 1865, Mason.

Madison County, third Monday of February, 1865, Parker; second Monday of October, 1864, Balcom; 1865, Mason.

Chenango County, first Monday of February, 1865, Parker; first Monday of September, 1864, Campbell; 1865, Balcom.

Otsego County, third Monday of June, 1865, Parker; first Monday of December, 1864, Campbell; 1865, Mason.

Delaware County, second Monday of January, 1865, Balcom; last Monday of August, 1864, Parker; 1865, Mason.

Schuyler County, third Monday of April, 1865, Balcom; first Monday of December, 1864, Balcom; 1865, Parker.

A Special Term of the Supreme Court will be held at the same time and place, by the same Justice, with each of the above-mentioned Circuits.

Additional Special Terms will be held at the Court House in each of the following counties:

Madison. First Tuesday of June, 1865, Mason.

Chenango. Third Tuesday of August, 1864, Mason; 1865, Balcom.

Delaware. Last Tuesday of May, 1865, Mason.

Tompkins. Last Tuesday of April, 1865, Parker.

Otsego. Third Tuesday of August, 1864, Campbell; 1865, Mason.

Cortland. Second Tuesday of August, 1864, Balcom; 1865, Parker.

Chemung. Second Tuesday of April, 1865, Parker.

Broome. Third Tuesday of April, 1865, Balcom.

Tioga. Third Tuesday of August, 1864, Balcom; 1865, Parker.

Schuyler. First Tuesday of June, 1865, Balcom.

SEVENTH JUDICIAL DISTRICT.

General Terms.

On the first Mondays of March, June, September, and December, at Rochester.

Circuit Courts, Courts of Oyer and Terminer and Special Terms.

Monroe. First Monday of January, 1865, E. D. Smith; first Monday of February, 1865, Welles; first Monday of April, 1865, J. C. Smith; first Monday of October, 1864, Welles; 1865, Johnson.

Steuben. Second Monday of January, 1865, at Corning, Johnson; first Monday of April, 1865, at Bath, Welles; fourth Monday of September, 1864, at Corning, J. C. Smith; 1865, at Corning, E. D. Smith; third Monday of November, 1864 and 1865, at Bath, J. C. Smith.

Cayuga. First Monday of January, 1865, Welles; second Monday of April, 1865, Johnson; first Monday of October, 1864, E. D. Smith; 1865, J. C. Smith.

Livingston. Fourth Monday of January, 1865, Johnson; fourth Monday of April, 1865, J. C. Smith; fourth Monday of October, 1864 and 1865, Welles.

Wayne. Third Monday of January, 1865, J. C. Smith; fourth Monday of April, 1865, Johnson; third Monday of October, 1864 and 1865, E. D. Smith.

Ontario. Second Monday of February, 1865, J. C. Smith; second Monday of May, 1865, Johnson; second Monday of November, 1864 and 1865, E. D. Smith.

Seneca. Third Monday of May, 1865, at Waterloo, E. D. Smith; fourth Monday of September, 1864 and 1865, at Ovid, Welles.

Yates. Fourth Monday of March, 1865, Welles; third Monday of October, 1864 and 1865, J. C. Smith.

Special Terms.

On the last Monday of every month, as follows: In Monroe, January, February, March, June, September, October, December; in Ontario, April; in Livingston, July; in Cayuga, August; in Yates, November; in Steuben, May, 1865, at Corning; May, 1865, at Bath.

EIGHTH JUDICIAL DISTRICT.

General Terms.

To be held in Buffalo, second Monday of February; first Monday of May; first Monday of September; third Monday of November.

Special Terms.

Erie. Last Tuesday of August, 1864, Grover; second Tuesday of November, 1864, Marvin; third Tuesday of January, 1865,

Grover; fourth Tuesday of March, 1865, Marvin; third Tuesday of June, 1865, Daniels; last Tuesday of August, 1865, Grover; second Tuesday of November, 1865, Daniels.

Circuit Courts and Courts of Oyer and Terminer.

Eric. First Monday of October, 1864, Marvin; first Monday of December, 1864, Grover; second Monday of March, 1865, Daniels; first Monday of June, 1865, Grover; first Monday of October, 1865, Marvin; first Monday of December, 1865, Grover.

Circuit Courts, and Courts of Oyer and Terminer, and Special Terms of the Supreme Court.

Alleghany. Second Monday of July, 1864, at Belmont, Grover; third Monday of October, 1864, at Angelica, Daniels; fourth Monday of March, 1865, at Belmont, Marvin; second Monday of July, 1865, at Angelica, Daniels; first Monday of October, 1865, at Belmont, Grover.

Cattaraugus. Fourth Monday of January, 1865, Grover; third Monday of June, 1865, Marvin; first Monday of October, 1864 and 1865, Daniels.

Chautauqua. Fourth Monday of September, 1864, Daniels; second Monday of January, 1865, Grover; third Monday of May, 1865, Daniels; fourth Monday of September, 1865, Marvin.

Genesee. Second Monday of November, 1864, Davis; second Monday of March, 1865, Grover; fourth Monday of June, 1865, Daniels; second Monday of November, 1865, Marvin.

Niagara. Fourth Monday of September, 1864, Grover; fourth Monday of January, 1865, Daniels; fourth Monday of May, 1865, Grover; fourth Monday of September, 1865, Marvin.

Orleans. Third Monday of September, 1864, Marvin; third Monday of January, 1865, Daniels; third Monday of May, 1865, Grover; fourth Monday of September, 1865, Marvin.

Wyoming. Fourth Monday of August, 1864, Davis; third Monday of December, 1864, Daniels; fourth Monday of April, 1865, Grover; fourth Monday of August, 1865, Marvin; third Monday of December, 1865, Daniels.

SUPERIOR COURT

OF THE CITY OF NEW YORK. 1864.

General Terms.

First Mondays of January, February, March, April, May, June, October, November, and December, and continue to last Saturday of such months, respectively.

Thursday, July 28, by Monell and Garvin, J. J.

Tuesday, August 30, by Barbour and McCunn, J. J.

Saturday, October 1, by Robertson, Ch. J., and Moncrief, J.

Special terms.

January, by McCunn, J.; February, by Barbour; March, by Moncrief; April, by Robertson; May, by Garvin; June, by Monell; October, by Moncrief; November, by Robertson; and December, by Barbour, J.

Trial Terms.

PART I. First Mondays of January by Garvin, J.; February, by Monell; March, by McCunn; April, by Barbour; May, by Moncrief; June, by Robertson; October, by McCunn; November, by Garvin; December, by Monell, J.

PART II. First Mondays of January, by Barbour, J.; February, by Moncrief; March, by Robertson; April, by Garvin; May, by Monell; June, by McCunn; October, by Barbour; November, by Moncrief; and December, by Robertson, Ch. J.

TERMS OF THE COURT OF COMMON PLEAS

FOR THE CITY AND COUNTY OF NEW YORK.

FOR THE YEARS 1864 AND 1865.

General Terms.

Third Mondays of February, April, June, October, and December. Held by all the judges. Open at 11 o'clock A. M.

Special Terms for the Trial of Issues of Fact.

First Mondays of January, February, March, April, May, June, October, November, and December. Open at 11 o'clock A. M.

The calendar of causes to be tried *by the court without a jury*, will be called at the trial terms on the fourth Mondays of January, March, May and November.

Special Terms for Issues of Law, Motions, and for Chamber business.

First Monday of January, by Judge Brady; February, by Judge Cardozo; March, by Judge Daly; April, by Judge Brady; May, by Judge Cardozo; June, by Judge Daly; July, by Judge Brady; August, by Judge Cardozo; September, by Judge Daly; October, by Judge Brady; November, by Judge Cardozo; December, by Judge Daly. Open at 10 o'clock A. M.

The Judge at Chambers will hold the same to and including the Saturday preceding the first Monday of the succeeding month.

During the general terms all the judges will attend to chamber business from 10 o'clock A. M. until 11 o'clock A. M.

INDEX

TO THE CODE AND RULES.

— • • —
The reference is to the page.

A.

- ABATE**, when action not to, 68.
ABSCONDING DEBTORS, attachment against property of, 104.
ABSENCE FROM STATE, effect of, on time of limitation, 62.
ABSENT DEBTORS, *See Non-resident*.
ACCOUNT, how stated in pleadings, 88.
 verified copy of, to be delivered, 88.
 further, may be ordered, 88.
 in justices' courts either party may be required to exhibit, 50, 51.
 pleading founded on, 50.
 reference to take, after judgment on issue of law, 128.
 for information of court, or to carry a judgment into effect, 124.
 by county treasurer, 229.
 by guardians, 182.
 See Bill of particulars, Current account, Long account.
ACCOUNTABILITY of guardian, 182.
ACKNOWLEDGMENT OF DEBT, when it must be in writing, 64.
 of undertakings, when necessary, 207.
ACT (Code), division of, 27.
 when to take effect, 198.
 to what to relate, 27.
 construction of, 196
 certain parts apply to justices' courts, 51.
ACTION defined, 26, 51.
 provisions of Revised Statutes applicable to proceedings in, not repealed, 191.
 abatement of, 64.
 order for discontinuance, 240.
 discontinuing in justice's court, 47.
 after discontinuance in justice's court, 48.
 on judgment, 54.
 on undertaking, when not allowed, 155.
 against foreign corporation, 184.
 by attorney-general to vacate charter of corporation, &c., 180.
 when deemed commenced, 62.
 when deemed pending for certain purposes, 78.
 how commenced, 71.
 can only be commenced within the period prescribed, 55.

ACTION—(continued)

- title of, not changed on appeal, 148.
- for discovery abolished, 174.
- form of, 77.
- kinds of, 26.
- criminal, defined, 26.
- and suit, distinction between, abolished, 58.
- limitation of, 54.
- parties to, 65.
- place of trial of, 69.
- severance of, 88.
- transfer of, 47, 48, 85, 88, 89, 40.
- pending*, defence of, 79.
- notice of, 72.
- when to be deemed, 78.
- submitting controversy without, 167.
- offer to compromise, 171, 51.

See *Cause of action*, *Civil action*, *Existing Suits*, *Thing in action*.

ADDITIONAL ALLOWANCE, 142. See *Allowance*.

ADDITIONAL TERMS of court of appeals, 81.

ADDITIONAL TIME, 179. See *Enlarging time*.

ADJOURNMENT of court of appeals, 82.

general and special terms of supreme court, circuits, and oyer and terminer, 34.

of hearing before referees, 124.

in justice's courts, 50.

costs on, 124.

ADJUSTMENT OF COSTS, by the clerk, 143.

notice of, 143.

of interlocutory costs, 144.

ADMEASUREMENT OF DOWER, in county court, 37.

ADMINISTRATOR. See *Executor*.

ADMISSION of counsel and attorneys regulated, 205, 241.

of service of summons, 77.

of genuineness of paper, when may be required, &c., 172.

in answer of *part* of plaintiff's claim, 111.

be not answering or replying, 85, 86.

ADULTERY, issues on questions of, how settled, 213.

ADVERSE claims to real estate, costs in proceedings on, 142.

actions to determine, 191.

party, examination of, as a witness, 173.

examination of, to same matter, when assignor of thing in action is examined, 176.

possession, what is, 57, 58.

action by grantee of land, held in, 65.

ADVERTISEMENT, publication of, how proved, 77.

See *Publication*.

ADVICE of counsel, how sworn to, 210.

AFFIDAVIT, title of, 179.

to be filed, 104, 206, 207.

copy to be served with order enlarging time, 179.

of merits to obtain order extending time to answer or demur, 210.

of service of summons, 77.

concerning venue, 221.

of disbursements, 143.

of publication, 77.

on motion, proceedings where a person refuses to make, 177.

folios of, to be numbered and marked, 209.

AFFIRMANCE, *judgment of*, 82.

in part, costs on, 166, 160.

in court of appeals, 82.

by default in court of appeals, not allowed, 204.

AFFIRMATIVE RELIEF, to defendant, 120, 126.

- AGE of infant, how ascertained, 222.
- AGENT, when liable to arrest, 91.
when he may verify a pleading, 83.
form of verification by, 83.
See *Managing agent*.
- AGREEMENTS as to proceedings in a cause, to be in writing or entered on minutes, 206.
- ALIEN ENEMY, time of limitation does not run against, 68.
- ALLEGATIONS in pleading, when deemed true, 86.
- ALLOWANCE, under section 303 of Code, 142.
" " 309 of Code, 143.
motion for, 220.
of bail, 95.
- AMENDMENT of complaint, time to answer after, 79.
of variances, 86. See *Variance*.
of complaint, proceeding after, 79.
of course, 87.
to case or exceptions, 213.
after decision on demurrer, 87.
by order, 87.
on appeal, 148.
to bring in new parties, 69.
by dividing one action into several, 88.
after notice of appeal, of any omission in perfecting appeal or staying proceedings, 144.
in justice's court, 50.
of justice's return on appeal, 220.
referee may allow, 124.
in actions or proceedings by mandamus, 197.
- AMOUNT ADMITTED to be due by answer, order for payment of, 111.
- AMOUNT CLAIMED, judgment by default not to exceed, 127.
of relief, 126.
- ANSWER, the only pleading by defendant is a demurrer or answer, 79.
statute of limitation must be set up by, 55.
time to answer, 79.
extending time to answer, 88, 178.
and demurrer, 81.
what to contain, 80.
and counter-claim, 80.
certain objections to complaint must be taken by, 55, 80.
in action for libel or slander, 85.
to recover property distrained, doing damage, 86.
of statute of limitations, 55.
constituting a counter-claim, 80.
of several defences, 81.
sham and irrelevant, may be stricken out, 81.
demurrer to, 81.
frivolous, 114. See *Frivolous demurrer, answer*, &c.
new matter in, when deemed controverted, 86.
judgment on failure of, 80, 112.
objections to complaint not appearing on the face thereof, are to be taken by answer, 80.
objection not taken by answer or demurrer, when waived, 80.
time to answer if complaint be amended, 79.
time to answer after service of order of arrest, 92.
order for extending time to answer, how obtained, 210.
may be allowed after time therefor has expired, 88.
time to answer after order for discovery of books, &c., 209.
admitting part of claim, 111.
amended, of course, 87.
of several defences, to be separately stated, 81.
to be numbered, 209.

ANSWER—(continued).

- of counter-claim, 80.
- to part, and demur to residue of complaint, 81.
- sham and irrelevant, may be stricken out, 81.
- when it may be replied or demurred to, 81.
- motion for judgment on, 82.
- supplemental*, when proper, 89.
- frivolous*, motion for judgment on, 114.
- discovery of documents to enable defendant to prepare, 208.
- striking out for non-compliance with order for discovery, 209.
- in justices' courts, 49.
- judgment for want of, 50.
- of title in justice's court, 47.

- to be accompanied with undertaking, 47.
- proceedings after, 47, 48.
- as to one of several causes of action, 48.

APPEAL *in general*, substitute for writ of error, 147.

- second, place of, on calendar, 81, 82.
- who may appeal, 147.
- parties to, how designated, 148.
- title of action not changed by, 148.
- how made, 148.
- entry on docket that judgment secured on, 123.
- mistake in proceedings *after* notice of, may be rectified, 148.
- clerk to transmit papers to appellate court, 148.
- intermediate orders reviewed on, 148.
- judgment on, 148.
- restitution on reversal of judgment, 149.
- new trial may be ordered on, 149.
- time for, 149, 158.
- cannot be enlarged, 173.
- when it commences to run, 149, 158.
- costs on, 141, 142.
- exceptions for purposes of, 122.
- sections 268 and 272 applied to pending appeals, 123.
- to court of appeals*, in what cases, 80, 123, 149.
- from judgment at general term on verdict subject to the opinion of the court, 121, 146, 149, 150.
- power of court on, 81, 122, 123.
- remittitur after, 81, 204.
- when to be reheard, 82.
- judgment on, 82.
- security or deposit on, 150.
- security or deposit may be waived, 150.
- sureties becoming insolvent, new undertaking may be ordered, 150.
- stay of execution on, from judgment directing the payment of money, 150.
- from judgment directing the assignment or delivery of documents or personal property, 151.
- from judgment to execute conveyance or other instrument, 151.
- from judgment directing sale or delivery of real property, or for the sale of mortgaged premises, 152.
- on appeal being perfected, proceedings stayed, 152.
- security may be dispensed with or limited in certain cases, 152.
- by executors, administrators, trustees or persons acting in another's right, 152.
- undertaking on, and service thereof, 153.
- security on, to be approved and justify, 153.
- undertaking on, may be in one instrument or several, 153.
- case of perishable property, 153.
- undertakings on, to be filed, 153.

APPEAL to court of appeals—(continued).

- time for, 149.
- statement of facts for, 149, 150, 214.
- what papers clerk is to return, 199.
- appellant to cause the return to be made, 199.
- how respondent may have it dismissed for want of a return, 199.
- if the return filed be defective, a further return may be ordered, 199.
- attorneys and guardians in court below to be deemed attorneys and guardians for the same parties on appeal, 199.
- in calendar causes, a case is to be made, 200.
- what such case is to contain, 200.
- cases and points to be printed, 200.
- copies of case to be served on respondent, 200.
- either party may notice for argument, 200.
- dismissal of, for not serving copies of the case, 200.
- form of order or judgment in court below after dismissal of, 200.
- copy notice of argument to be sent to clerk, 200.
- clerk to make a calendar, 201.
- copies of cases and points to be furnished the judges, clerk, and opposing counsel, 201.
- statement of facts on points, 201.
- one counsel only on each side, 201.
- extended discussion on question of fact not allowed, 201.
- judgment of affirmance or reversal by default, 201, 202, 204.
- criminal cases to have a preference, 201.
- may be submitted on printed arguments, 202, 204.
- time prescribed by rules may be enlarged, 202.
- exchanged causes, 202, 203.
- ten causes called each day, 202.
- date of issue of passed causes, 202.
- striking cause from calendar, 202.
- clerk to keep memorandum of the exchanged causes, 203.
- certain rules and notice to be printed on calendar, 203.
- Not more than two hours to be occupied by argument of each counsel, 203.
- preferred causes, 202, 203.
- calendars to continue for one year, 203.
- notice to be for the January term, 202.
- no defaults allowed, 203.
- call of calendar, 202, 204.
- costs on, 142.
- to the supreme court from an inferior court, in what cases, 154.*
 - security upon, 154.
 - where heard, 154.
 - judgment on, where entered and docketed, 154.
 - time for, 149.
- in the supreme court, superior court, and New York common pleas, from a single judge to the general term.*
 - time for, 149.
 - from certain judgments, 155.
 - does not stay proceedings, except, &c., 155.
 - how heard, 155.
 - security on, 155.
 - when action on undertakings given on appeal allowed, 155.
 - in the case of certain orders, 150.*
 - in New York common pleas, 247, 248.
 - costs on, 141.
 - from order at chambers on notice, 147, 151, 156.
 - order of, on the calendar, 216.
 - papers on to be printed, 217.

APPEAL *in the supreme court, &c.,—(continued).*

- copy papers for the court on, 216.
- what papers to be furnished on, 216.
- notice of, 148, 216.
- no extended discussion on question of fact, 213.
- judgment on, 33, 41.
- from chamber order, made ex parte*, 147.
- in New York common pleas*, 249.
- from judgment on report of referee in superior court*, 244.
- to the court of common pleas for the city and county of New York,*
or to a county court from an inferior court,
- existing laws as to, repealed, 157.
- in what court appeal to be had, 157.
- time for, 158.
- when process not personally served, 158.
- notice of appeal, what to contain, 164, 169.
- notice of appeal to be served and costs paid, 159.
- from judgments of marine and justices' courts, security to be
given or depo-it made, 159.
- notice of appeal, 159.
- service of the notice, 159.
- security to stay execution, 160.
- form of undertaking, 160.
- execution, how stayed, 160.
- where justice dead or removed, 161, 162.
- return, how made and compelled, 161, 220.
- cannot be compelled till fees paid, 161.
- where justice is out of office, dead, insane, &c., 162.
- amended, or further, 162, 220.
- hearing of, in cases in which new trial *may not* be granted, 162,
163.
- to be on original papers, 163.
- in cases in which a new trial *may* be ordered, 162.
- argument to be oral, 249.
- dismissal of, for want of prosecution, 162.
- judgment on appeal, 163.
- new trial on, 162, 163.
- founded on error in fact not affecting the merits, 163.
- where defendant failed to appear below, and satisfactorily excuses
his default, and manifest injustice has been done, 163.
- proceeding where new trial ordered before the justice, 163.
- where the appellate court is to proceed and try the cause, power
of the court thereon, &c., 163, 164.
- judgment-roll, 164.
- costs on, how awarded, 164.
- amount of, 165, 166.
- restitution may be awarded, 76, 149, 164.
- set-off of costs and recovery, 165, 166.
- amount of cos's on, 165, 166.
- fee to justice for his return, 166.
- from judgment on submission of controversy without action, 168.
- from order allowing a provisional remedy, 178.
- in existing suits, 193.
- from surrogates' courts*, not affected by the second part of the Code,
197.

rules regulating, 217.

APPEALS. See *Court of Appeals.***APPEARANCE**, what to be deemed, 203.

entitles defendant to notice of application for judgment, 113, 181.
voluntary, equivalent to personal service of summons, 77.

APPELLANT, the party appealing is, 143.**APPOINTMENT of terms, &c.,** 33, 34, 85, 194.

- ARGUMENT**, notice of, of appeal in court of appeals, 200.
to general term of supreme court, 217.
of cases reserved for, 201.
- ARREST**, no person to be arrested in a civil action, except as prescribed by the Code, 90.
Code not to affect the act to abolish imprisonment for debt, &c., or amendments thereto, 90.
provisions of Code as to, not to apply to proceedings for contempts, 90.
in what cases, 91.
on proceeding supplementary to execution, 184.
of female, 91.
order for, by whom made, 91.
affidavit to obtain, 92.
to be filed, 206.
security on issuing of, 92.
when made, 92.
form of, 92.
within what time to be served, 92.
undertaking and affidavit to be filed, 206, 207.
and affidavit to be delivered to sheriff, 93.
copy of, and affidavit to be delivered to defendant, 93.
motion to vacate, 97.
delivery of defendant's undertaking to plaintiff, 94.
how made, 93.
defendant may be discharged from, on bail or deposit, 93.
by bail, 93, 94.
in action for usurping an office, 188.
See Bail.
- ASSAULT**, *action for*, must be brought within two years, 61.
justices of the peace have no jurisdiction of, 46.
costs in, 140.
- ASSESSMENT** of *damages* where there is no answer, 112, 118, 211.
after judgment on issue of law, 123.
after appeal to court of appeals from order granting a new trial, 81.
to defendant, 120.
- ASSIGNEE** of *thing in action* may sue in his own name, 65.
takes subject to right of set-off, 65.
is liable for costs, 146.
pending an action, may be substituted as plaintiff, in lieu of assignor, 68.
of property held adversely, may sue in name of assignor, 65.
- ASSIGNMENT** of *thing in action*, in what cases, 65.
effect of, on set-off, 65.
not to abate the action, 68.
- ASSIGNOR** of *thing in action*, examination of, as a witness, 170.
- ASSOCIATION**. *See Banking association.*
- ATTACHMENT**, in what cases it may issue, 104, 105.
by whom granted, 104.
requisites to the issuance of, 105.
affidavit to obtain, to be filed, 105, 200.
security on issuance of, 105.
to whom directed, and what to require, 105.
several may issue at the same time to different counties, 105.
how executed, 106.
proceedings on, in case of perishable property or vessels, 106.
of rights and shares of defendant in the stocks of corporations, &c., 106.
sheriff may sue for debts, &c., 106, 108.
plaintiff in, may prosecute action on notes, &c., attached, 108.
how executed on property incapable of manual delivery, 106.
certificate of the defendant's interest in stock of corporation to be furnished to sheriff, 107.

ATTACHMENT—Continued.

- defendant may procure discharge of, and return of property in-
g and making, 132.
- discharge of the defendant on such discharge of attachment, 132.
- return of, and proceedings thereon, 132.
- sheriff's fees on, 132.
- allowance in execution of writs in action commenced by, 132.
- how satisfied, on judgment for the plaintiff in the action, 132.
- sheriff may release himself of property attached, 132.
- court may order return in action on return, 132.
- residue of attached property, after satisfaction of judgment, 132.
- returned to defendant, 132.
- on judgment for the defendant, the bond given to the sheriff for the
attachment to be delivered to the defendant, 132.
- to enforce payment of costs against quantum of an action, 132.
- 132.
- against return of writs of return, 132.
- for disobeying order for delivery, 132.
- for return, for disobedience to orders in supplementary process,
132.

ATTEMPT to commence action, equivalent to commencement, 32.**ATTENDANCE of parties, as witnesses how enforced, 132.****ATTENDANTS for courts, supervisors to provide, 32, 33.****ATTORNEY, regulations as to admission of, to practice, 200, 210.**

- when liable to arrest, 31.

- service of process or cause upon, 130.

- appearance by, 33.

- to meet case on appeal, 200.

- to enforce same and place of residence on papers, 207.

- agreement by, as to proceeding in action, to be in writing and
signed on admission, 200.

- duty of, to act as guardian ad litem, 231.

- substitution of, 200, 240.

- when he may verify pleading, 32.

- to enforce pleadings, 32.

ATTORNEY-GENERAL, actions by, 136.**B.****BAIL, defendant may be discharged from arrest on, 32.**

- how given, 32.

- surrender of defendant in execution of, 32.

- may arrest defendant, 34.

- how proceeded against, 34.

- how - monetized, 34.

- notice of, to plaintiff, 34.

- notice of non-acceptance of, or exception, by plaintiff, 34.

- when plaintiff deemed to have accepted, 34.

- notice of justification of, 34.

- note, notice of justification of, 34.

- qualifications of, 35.

- justification of, 35.

- where to justify, 35, 205.

- allowance of, 35.

- deposit in lieu of, 36.

- sheriff, when liable as, 36.

- substituting for deposit, 36.

- liable to sheriff, 37.

- motion to reduce amount of, 37.

BANK, accounts with, how kept, 220.

- orders upon, in what form, 220.

- BANKING ASSOCIATIONS**, time of limitation not applicable to actions against, 61.
- BANK NOTES**, time of limitation not applicable to actions upon, 64.
- BATTERY**. See *Assault*.
- BILL OF EXCEPTIONS** not necessary, 121. See *Exceptions*.
- BILL OF EXCHANGE**. See *Bills and Notes*.
- BILL OF PARTICULARS**, court may order either party to deliver, 83.
See *Account*.
- BILLS AND NOTES**, complaint in action on, 84.
costs of several actions on, 140.
parties to actions upon, 63.
put in circulation as money by moneyed corporations, limitation of action on, 64.
provisions as to assignment not to apply to transfer of, 65.
action or defence upon, how pleaded, 84.
- BOND**, *actions on*, justice of the peace has jurisdiction in certain, 48.
costs of several actions on same bond, 140.
executed before July 1, 1848, judgment on, 188.
to be proved or acknowledged, 203.
of assignee for benefit of creditors, 249.
See *Official bond*, *Surety bond*, *Undertaking*, *Replevin bond*.
- BOOKS**, clerk to keep certain, 207, 127.
See *Discovery*, *Inspection*, *Judgment-book*, *Production*.
- BROKER**, when liable to arrest, 91.
- BUFFALO**, appeal from justice's courts in, 158.
superior court of, 80, 158.
- BUSINESS out of court**, judges may transact, 35.
See *Judge at chambers*.
- BY-LAW of city corporation**, action upon, may be brought in justice's court of a city, 62.

C.

- CALENDAR**, *supreme court*, when clerk to enter cause on, 116.
order of disposing of issues on, 118.
issues of law to have preference on, 118.
criminal cases to have preference on, 219, 239, 241.
when cause may be struck from, 217.
In New York common pleas, 247.
In the superior court, 246, 247.
In the first district, 233.
of court of appeals, clerk to make, 201.
to be printed, and copies delivered to judges, 201.
rules 6, 10, 12 and 20, with notice that 14 copies of cases and points are required to be printed on, 203.
criminal cases to have a preference on, 202, 239.
how regulated, 203, 204.
exchange of causes on, 202, 203.
call of, 218, 214.
to continue for one year, 204.
preferred causes on, 202, 203, 239.
for general term of supreme court, clerk to prepare and print, 216.
appeals, how placed on, 216.
other cases, how placed on, 216.
certiorari to remove proceeding to have a preference on, 219.
- CALLING PLAINIFF** not necessary, 212.
- CASE** on trial of question of fact by the court, 122.
after trial by court or referee, or to set aside nonsuit, dismissal of complaint or verdict, 218.
time to make, 218.
time to propose amendments, 218.

CASE—(continued).

settlement of, 120, 122, 213, 214.
 to be filed, 206.
 order declaring it abandoned, 212.
 statement of, for appeal to court of appeals, 214.
 to be printed, 216.
 motion for new trial on, 121.
 on appeal from motion for new trial, 121.
 agreed on by the parties, 167.
 not provided for by the Code or the rules, 196, 284.
in court of appeals, what to contain, 200.
 to be printed, 200.
 copies to be served, 200.
 copies of, for judges, 201.

CAUSE OF ACTION, when it accrues on a current account, 61.

when it accrues in cases of fraud, 60.
 what may be joined, 85, 86.
 when to be numbered, 209.

CAUSES of demurrer, 79.

CERTAIN. See *Indefinite and uncertain*.

CERTIFICATE of service of summons by the sheriff, 77.

to enable parties to appeal from order on a point of practice, 248.

of good moral character of applicants for admission to practice as attorneys, 205.

of defendants' interest in rights and shares in corporations, 7.

that title came in question on trial, 48.

that no return filed in court of appeals, 199.

of deposit in lieu of bail, 96.

CERTIORARI to remove proceedings, hearing of, to be preferred on calendar, 219.

where heard, 219.

CHAMBERS, orders at, how vacated or modified, 147, 154.

orders at, appeal from, 147, 151, 154.

adjournment of special term to, 85.

business at, 85.

appeal from order at, in common pleas, 248.

See *Judge at chambers*.

CHANGE of attorney, 203, 240.

of place of trial, 70, 71.

when the county designated is not the proper county, 70, 71.

because an impartial trial cannot be had, 71.

for convenience of witnesses, and to promote justice, 71.

effect of, 71.

transfer of papers on, order for, 71, 206.

See *Exchange*.

CHARTER of city corporation, action on, in justices' courts, 52.

of corporation, action to annul, 185, 186.

CHATTELS. See *Goods or chattels*.

CHILDREN, questioning legitimacy of, 233.

See *Infant*.

CHOSE IN ACTION. See *Thing in action*.

CIRCUIT, issues of fact in the supreme court, when the trial is by jury, to be taken at, in other cases at the circuit or special term, 116, 117.

issues of law to be tried at circuit or special term, 115.

number of counsel to examine witnesses and sum up at, limited, 218.

nonsuit at, 218.

calling plaintiff, 218.

appeals from, 155.

courts, statutes as to, repealed, 33.

times and places, &c., of holding, 34.

extraordinary terms of, 34.

may be adjourned by entry on the minutes, 35.

CIRCUIT courts—(continued).

jury may be drawn for an adjourned circuit, 85.
 notice of trial may be given for adjourned, 85.
 inability of judge to hold, 35.
 rooms for holding, 35.

CIVIL ACTION defined, 27.

See *Action*.

CIVIL REMEDY not merged in criminal remedy, 27.

CLAIM against deceased persons, cost of proceedings on, 145.

personal, notice of having none, 72.

admitted by answer, order for satisfaction of, 111.

See *Amount, Bill of Particulars, demand*.

CLAIM AND DELIVERY of *personal property* in courts of record, 97.

requisites of affidavit to obtain delivery, 98.

requisition to sheriff to take and deliver the property, 98.

security for return of the property, 98.

defendant may except to plaintiff's sureties, 99.

when defendant deemed to have waived exception to plaintiff's sureties, 99.

plaintiff's sureties, when and how to justify, 99.

when sheriff responsible for sufficiency of plaintiff's sureties, 99.

when defendant cannot reclaim the property taken, 99.

when defendant entitled to a re-delivery of the property taken, 99.

defendant to give undertaking with sureties, 99.

when property taken is to be delivered to plaintiff, 99.

defendant's sureties, when and how to justify, 99.

when sheriff responsible for defendant's sureties, 99, 100.

qualification and justification of sureties, same as on arrest, 100.

property, how taken when concealed in any building or inclosure, 100.

duty of sheriff as to keeping and delivering property taken, 100.

claim of property by third party, 100.

notice and affidavit, and proceedings thereon, to be filed, 101.

verdict on, 119.

in justices' courts, 43.

affidavit, 44.

undertaking on part of plaintiff, 44.

direction to constable, 44.

summons, 44.

duties of constable, 45.

defendant may except to plaintiff's sureties, 45.

proceedings on exception to plaintiff's sureties, 45.

judgment for defendant, if plaintiff's sureties fail to justify, 45.

defendant may require return of the property, 45.

undertaking on the part of defendant, 45.

qualification and justification of sureties, 46.

sections 214, 215, 216 of Code apply to, 46.

trial of, 46.

jury to assess value of property and damages, 46.

when action may proceed without personal service of summons, 46.

fee of justice, 46.

CLAIM to *real property*, allowance in addition to costs in proceedings to determine, 142.

CLAIM to real property—(continued).

within what time to be made, 55.

of third party in supplementary proceedings, 131.

See *Adverse claim*, *Conflicting claim*, *Ejectment*.

CLERK, the word defined, 196.

duty of, on receipt of note of issue, 116.

on docketing justice's judgment, 49.

to keep a judgment-book, 127.

other books, 207.

to insert costs in entry of judgment, 143.

to make up judgment-roll, 127.

to compute interest on verdict or report of referee, 143.

to enter judgment in conformity with verdict, 120.

to enter chamber order, 156.

as to preferred causes, in first district, 240.

to transmit papers to appellate court, 143.

service on, for the party, 181.

to enter name of counsel taking order. &c., by default, 220.

his duty on entry of judgment by confession, 171.

for want of an answer, 112.

of court of appeals,

to make a calendar, 201.

duty of, as to exchanged causes, 203.

fees of, 144.

CODE, See *Act*.

of other States, &c., evidence of, 184.

CO-DEFENDANT, when he may be examined as a witness, 176.

See *Defendant*.

COMMENCING ACTION, manner of, 71.

when deemed commenced, 62.

time for, 54.

See *Limitation of actions*, *Time for commencing actions*.

COMMISSION OF LUNACY, fees on executing, 230.

COMMISSION, costs of drawing interrogatories to answer to, 141.

to receivers of property of foreign corporation, 111.

COMMISSIONERS of highways, appeals from determination of, to county court, 37.

COMMON LAW, a rule of construction of, not to apply to Code, 196.

of other States and countries, how proved, 184.

COMMON PLEAS, for the city and county of New York, jurisdiction of, 39, 40.

removal of causes from, to supreme court, 39.

may review judgments of marine and justices' courts, 40, 157.

terms of, 40.

general terms of, by whom held, 41.

special terms, by whom held, 41.

judgment on appeal, where given, 41.

at general term, how pronounced, 41.

rehearing of appeal, 41.

judges of, not to receive fees, 41.

when justice's judgment to be deemed a judgment of, 52.

may appoint a crier, 41.

rules of, 247.

continuation of calendar, 247.

reserving causes, 247.

causes off for the term, 247.

causes to be tried by the court without a jury, 247.

number of causes on calendar each day, 247.

reserving causes at general term, 247.

short causes, placing on special circuit calendar, 243.

review of questions of practice, 243.

appeals from orders to be submitted on certified copies of papers, 243.

- COMMON PLEAS** *for the city and county of New York, rules of*—(continued).
 argument of appeals, from marine and district courts, 249.
 assignee's bond for benefit of creditors, 249.
 reference in supplementary proceedings, 249.
terms of, 262.
- COMPANY** officers and directors of, may be arrested, 90.
- COMPENSATION** to attorneys, 139.
- COMPLAINT** is the first pleading on the part of the plaintiff, 78.
requisites of, ordinarily, 78.
 in action for libel or slander, 84.
 what causes of action may be joined in, 85.
 allegations of, when admitted, 85.
 time to answer, 78.
 after service of order of arrest, 91.
 copy of, need not be served with summons, 72.
 demand of copy of, 71.
 only one copy need be served on the same attorney, 72.
 when copy to be served after demand, 72.
 demurrer to, 73.
 objections to, when deemed to be waived, 79.
 when to be served after order for discovery of books, &c., 209.
 motion for judgment for not serving copy, 126.
 after notice of no personal claim, copy need not be served, unless demanded, 72.
 after amendment, 79.
filing of, before publication of summons, 75.
 in all cases, 181.
dismissal of, for not serving copy, 126.
 for not proceeding to trial, 124, 211.
discovery, to enable plaintiff to prepare, 208.
amendment of, 81.
 answer after, 79.
supplemental, when allowed, 68, 88.
 verification of, 82.
in justices' courts, 49.
See Pleading.
- COMPROMISE**, offer of, 51, 171.
See Offer.
- COMPUTATION of time.** *See Time.*
- CONCEALED DEBTORS**, jurisdiction of county court as to, 37.
- CONCEALED DEFENDANT**, attachment against the property of, 104.
 service of process on, by publication, 75.
See Attachment.
- CONDITIONAL EXAMINATION** of parties, 178.
 costs on attending to take, 141.
- CONDITIONAL ORDER**, time for complying with, 221.
- CONDITION PRECEDENT**, performance of, how pleaded, 84.
- CONFESSION of judgment without action**, judgment may be confessed for debt due, or contingent liability, 170.
 statement in writing, and form thereof, 170.
 statement for, to be filed, and judgment entered thereon, with \$5 cost, 171.
 judgment-roll, how constituted, 171.
 execution of such judgment, 171.
 execution for installment of such judgment, 171.
 in justices' courts, 48.
- CONFLICTING CLAIMS** to *real property*, actions to determine, 191.
 provisions of revised statutes applicable, 191.
 place of trial of, 69.
 allowance in addition to costs in proceedings to determine, 142.
 to personal property, when interpleader allowed on, 68.

- CONSENT**, judgment in action for divorce cannot be taken by, 223.
 as to proceedings in a cause to be in writing, 203.
- CONSTABLE**, action against, to be within two years, 60.
- CONSTRUCTION of will, &c.**, allowance in action for, 143.
 of pleadings, 83.
 of Code, 196.
- CONSTRUCTIVE NOTICE**, when notice of *lis pendens* is, 73.
- CONTEMPT** in disobeying order in supplementary proceedings generally, 138.
 for not attending as a witness, 174.
 provisions as to arrest and bail do not apply to proceedings for, 89.
 services to bring a party in a Code does not apply to, 181.
- CONTESTED MOTIONS**, where to be heard, 177.
- CONTINUANCE OF ACTION** by assignee or representative, &c., 68.
- CONTRACT**, actions on, within what time to be commenced, 60.
 evidence of new, or continuing, must be in writing, 64.
See Performance.
- CONTROVERSY**, court may determine, 63.
submitting without action, 167, 217.
- CO-PLAINTIFF, or CO-DEFENDANT**, examination of, as a witness, 176.
- COPY** of paper or pleading may be substituted for a lost original, 183.
 when court may give leave for copy to be taken of documents in possession of opposite party, 172.
 clerk's fee for, 144.
of pleadings, &c., to be furnished to Court.
 on jury trial, 119.
 on enumerated motions, 216.
 on argument on special verdict, 216.
 on appeal to general term, 217.
 from surrogate, 217.
 when not required in mortgage and partition cases, 216.
 on case agreed on, 217.
- CORONER**, when to act in place of sheriff, 182.
 provisions relating to sheriffs to apply to, 182.
 action against, to be taken within two years, 60.
 duty of, in serving or executing process, 182.
- CORPORATION**, service of process on, provisions of the Code applied to justices' courts, 51.
 service of summons on, 74.
 injunction to suspend business of, 103.
 superior court, New York common pleas, mayors' courts of cities, and recorders' courts of cities, have jurisdiction of, 40.
 actions against, in the name of the attorney-general, 187.
 interest in, may be sold under attachment, 107.
 judgment of forfeiture against, 189.
 receiver of property of, 111.
 how examined, as to property of a judgment debtor, 195.
 action to annul charter of, 187, 189.
See Attachment, Foreign corporations, Municipal corporation, Quo warranto, Religious corporations, Scire facias.
- COSTS**, all statutes, rules, &c., as to costs or fees of attorneys, solicitors, or counsel, repealed, 189.
 amount of, to be regulated by agreement between the parties, 139.
 certain allowances to prevailing party, called costs, 139.
 to plaintiff of course, 139.
 not to exceed amount of damages, 140.
 in several actions on one instrument, 140.
 to defendant, 140.
 to either party in discretion of the court, 140.
 amount of, 141.
 allowance in addition to, 142. *See Allowance.*
 how inserted in judgment, 143.

COSTS—(continued.)

- adjustment of, 143, 144.
- in action in name of the people, 145, 146.
- against an infant plaintiff, 146.
- on a settlement, 143, 147.
- after discontinuance in justice's court by reason of answer of title, 47, 49.
- in an action by or against an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue, 145.
- in proceedings against joint debtors, heirs, devisees, &c. (ss. 875, 881), 142.
- on claim against a deceased person, referred pursuant to the statute, 145.
- in action to recover dower, 142.
- on confession of judgment without action, 171.
- on submitting controversy without action, 163.
- on appeals from surrogates' courts, 197.
- set-off of, 165, 166.
- after offer of defendant to compromise, or to liquidate damages, 172.
- after notice of no personal claim, 72.
- on appeal, 141, 142.
 - from justices' courts, 164, 165.
 - in a special proceeding, 145.
- against assignee, 146.
- party in interest liable for, 146.
- on postponement of trial, 144.
- on motion, 145.
- on motion for judgment on special verdict, or for judgment subject to the opinion of the court, or for a new trial on a case at general term, 142, 143.
- against married woman, how collected from, 181.
- interlocutory*, how adjusted, 144.
- in supplementary proceedings, 188.
- in justice's court, 46.
 - after offer, 51.
- security for, 145.
- on review of a decision of an inferior court, 145.
- on perpetuating testimony, 141.
- on conditional examination of witness, 141.
- on sale of real estate of infant, 224.

COUNSEL,

- when liable to arrest, 91.
- to endorse papers on taking a default, 220.
- only one on each side to be heard in court of appeals, 201.
- admission and examination of, 205.
- number of, on trial of issues of fact, 212.
- on hearing at general or special term, 220.
- advice of, how sworn to, 210.
- to stand to examine witness, 212.

See Attorney.

COUNTER-CLAIM defendant may set up in answer, 80.

- what may be set up as, 81.
- several may be set up, 81.
- where several set up they are to be separately stated, 81.
- reply or demurrer to, 81.
- allegations of, when deemed true, 85, 86.

COUNTY COURTS,

- existing provisions of law as to, repealed, 86.
- pending suits not affected by repeal of existing law, 86, 48.
- jurisdiction of, 86.
- exclusive power to review justice's judgment on appeal, 86, 152.
- when open, 88.
- terms of, 88.
- jurors in, 88.
- of Kings and Erie counties, exception as to, 87.
- suits in, may be transferred to supreme court, 36, 48.
- appealed from*, to supreme court, 154.
- new trial on appeal from, 157, 158.

- COUNTY JUDGE has power of a judge of supreme court at chambers, 177.
orders by, 117.
orders of, how reviewed, 154.
may enlarge time for taking proceedings in the action, 178.
- COUNTY TREASURER, moneys to be paid to, 229.
accounts of, how to be kept, 229.
to make an annual report, 230.
reference to examine his accounts, 230.
- COURT *below*, attorneys and guardians in, to be deemed such in court of appeals, 199.
trial by, 119. See *Trial by the court*.
of appeals, jurisdiction of, 30, 149.
power of, 31.
appeals to, 30.
appeals to, from justices' courts, 31.
either party may bring on cause for argument, 200.
terms of, 31.
additional terms of, 31.
preference of causes on calendar of, 31, 201, 202.
position of cause on calendar on a second or subsequent appeal, 31, 32.
judgment of, how pronounced, 32.
sheriff to provide rooms for, 32.
where to be held, 32.
how adjourned, 32.
rehearing in, 32.
judgment of affirmance in, 32.
rules of, 199.
of common pleas. See *Common pleas*.
superior. See *Superior Court*.
county. See *County courts*.
recorders. See *Recorders' courts*.
mayors. See *Mayor's court*.
ofoyer and terminer, statutes as to, repealed, 33.
of justices of the peace, 42.
- COURTS, enumeration of, 29.
jurisdiction of, generally, 30.
when they acquire jurisdiction, 77.
- CRIER for court of common pleas and superior court, New York, 41.
- CRIMINAL *action* defined, 26.
cases, have preference on calendar, 201, 219.
conversation, actions for, cannot be brought in justice's court, 46.
to be brought within six years, 60.
costs in, 140.
- CURRENT ACCOUNT, time of limitation in actions to recover balance of, 61.

D.

- DAMAGE, answer in action to recover property distrained for, 85.
- DAMAGES, rate of, where recoverable, 127.
writ of inquiry of, 31.
defendant's, jury may assess, 120.
defendant may offer to liquidate, 51, 172.
by reason of injunction, reference to ascertain, 102.
assessment of, on judgment by default, 113.
in action for usurping office, 189.
- DATE *of issue*, on appeal, 21, 31, 32.
- DEATH *of party to action*, effect of, 68.
on time of limitation, 59, 68.
after verdict, 68.
of justice, whose judgment is appealed, effect of, 161, 162.

- DEBTOR** to judgment debtor *may* pay amount of his indebtedness to sheriff in certain cases, 185.
 examination of, in supplementary proceedings, 188.
See Absent debtors, Concealed debtors, Imprisoned Debtors, Insolvent debtors, Joint debtors.
- DECEASED PERSONS**, costs on reference of claim against, 145.
 judgment debtor, proceedings against heirs and devisees of, 145.
- DECISION** on trial of question of fact by the court, 122.
 of law, 122.
See Judgment.
- DECREE**, time for commencing action on, 60.
 of surrogate, appeals from, regulated, 217.
See Judgment.
- DEFAULT** of answer, when judgment may be taken for, 112.
 when plaintiff may be required to give security before taking judgment for, 114.
in court of appeals, not allowed, 204.
order or judgment by, counsel taking, to endorse paper containing proof of service, 220.
 in proceedings to obtain mandamus or prohibition, 220.
 on motion, 215, 219.
 judgment by, not allowed in action for divorce, 216.
 orders taken by, to state name of counsel taking, 220.
 in justices' courts, judgment on, 50.
See Inquest.
- DEFECT** of parties, demurrer for, 79.
 when to be disregarded, 89.
See Errors and defects, Mistake.
- DEFENCE**, after judgment, 75.
 when deemed waived, 80.
 where more than one, to be numbered, 209.
 sham and irrelevant, may be struck out, 81.
See Equitable defences, Irrelevant defences, Partial defences, Shum defences, Several defences.
- DEFENDANT**, party adverse to plaintiff is, 53.
 who to be, 67.
 service of summons on, 74.
 served by publication, may be allowed to defend after judgment, 75.
 arrest of, 90, 91.
 attachment against property of, 104.
 appearance by, 77. *See Appearance.*
 entitles to notice of all ordinary proceedings in the action, 181.
 entitles him to notice of application for judgment, 118.
 arrest of, in what cases, 91.
 order on, to satisfy amount admitted due, 111.
 affirmative relief to, 120, 126.
 judgment against one of several, 118, 119, 126.
 damages of, jury to assess, 120.
 when papers need not be served on, 181.
 costs to, of course, 140.
 where several defendants, 140.
 offer of, 61, 171.
 examination of, to the same matter, 174.
 in person, to endorse papers, 203.
 when to furnish copy pleadings to court, 119.
 not personally served with process in justice's court, time for appeal, 158.
 how punished for not obeying order for discovery, 209.
See Absent defendant, Co-defendant, Parties, Several defendants, Arrest.
- DEFICIENCY** on mortgage, county court has jurisdiction for collection of, 86.
- DEFINITE**. *See Indefinite.*

- DEFINITION** of action, 26.
 of civil action, 27.
 of criminal action, 26.
 of special proceeding, 26.
 of judgment, 112.
 of trial, 115.
 of general verdict, 119.
 of special verdict, 119.
 of order, 177.
 of motion, 177.
 of real property, 195.
 of personal property, 195.
 of property, 196.
 of district, 196.
 of clerk, 196.
- DEFINITIONS and divisions**, 26.
- DELIVERY** of personal property, 43, 44, 97. See *Claim and delivery of personal property*.
- DEMAND** that trial be had in proper county, 70.
 of copy complaint, when and how made, 72.
 of admission of documents, &c., 172.
 of particulars, 83.
- DEMURRER**, or answer, only pleading on part of defendant, 79.
 within what time to be served, 79.
 need not be verified, 83.
to complaint, in what cases, 79.
 may be to all complaint or to any one alleged cause of action, 79.
 when it may be disregarded, 79.
 must specify the grounds of objection, 79.
 objections not appearing on face of complaint to be taken by answer, 80.
 grounds for, when deemed waived, 80.
to amended complaint, 79, 80.
 and answer, 80, 81.
 for improper joinder of causes of actions, proceedings after, 83.
to answer, in what cases, 82.
to counter-claim, 82.
to reply, 82.
frivolous, judgment on, 114. See *Frivolous demurrer*.
 appeals to general term from order overruling, &c., 156.
 amendments after, 88.
in justices' courts, 50.
- DENIAL**, how made, 80.
- DEPOSIT**, *in lieu of bail*, defendant may be discharged from arrest on, 96.
 sheriff to give defendant certificate of, 96.
 to be paid into court, 96.
 substituting bail for, 96.
 disposition of, 96.
 of moneys, &c., in court, 96, 111.
 order for payments of, out of court, 230.
 with Trust Company of New York, account of, how kept, &c., 230.
in lieu of security, on appeal, 150.
- DEPOSITION**, on motion, 173. See *Commission, Conditional examination*.
- DESCENT CAST**, effect of, 59.
- DETAINING** personal property, action for, within what time to be brought, 60.
- DETERMINATION**, complete, ordering parties to be brought in to effect, 63, 69.
proper, " " " " " " 88.
 of ultimate right of the parties, power of the court to make, 126.
 of conflicting claims to real property, 191.
 to personal property, 97.
 by interpleading, 69.

- DETERMINATION**—(continued).
 of court or officer of special jurisdiction, how pleaded, 84.
 See *Final determination, Judgment*.
- DEVISEES** of deceased judgment debtor, proceedings against, 169.
 costs in proceedings against, 142.
 See *Joint debtors. &c.*
- DIFFICULT and extraordinary cases**, allowance in, 148.
- DIRECTOR** of moneyed corporations, provisions as to limitations of actions
 not to apply to certain actions against, 64.
 arrest of, 91.
- DISABILITIES**, what are, 59, 68.
 effect of, 59.
 when they must exist, 64.
 defendant out of State, 62.
 of alien enemy, 68.
 by death of party entitled to sue or be sued, 64.
 several, effect of, 64.
 not applicable to certain actions, 64.
- DISBURSEMENT**, affidavit of, 144. See *Costs*.
- DISCONTINUANCE**, order for, 240.
- DISCOVERY**, action for, abolished, 178.
in justice's court, by reason of title coming in question, 47.
 of property, order for, 188.
 to prepare pleadings, 208.
 of books, papers, and documents, 172, 208.
 order for, 181, 209.
 to operate as a stay, unless, &c., 209.
 motion for, how made, 208.
 motion papers, what to state, 208.
 order for, how enforced, 209.
 See *Production*.
- DISMISSAL** of appeal in the court of appeals, 199, 200.
 on appeals from justice's court, 162.
 of complaint, for not serving copy, 126.
 for not proceeding in action, 126, 211.
 See *Nonsuit*.
- DISOBEDIENCE** to order in supplementary proceedings, how punished, 188.
- DISTRAINED property**, answer in action to recover, 85.
 action for recovery of, where to be tried, 70.
- DISTRICT**, the word defined, 196.
courts in the city of New York, 51.
 appeals from, 157.
- DIVISION** of act, 27.
 of actions, 26.
 of remedies, 26.
 of causes of action on allowance of demurrer for misjoinder, 68.
- DIVISIONS and definitions**, 26.
- DIVORCE**, summons in action for, may be served by publication, 75.
 complaint for, 232.
 answer in action for, 233.
 judgment by default or consent cannot be taken in, 216.
 trial of issues in actions for, 218.
 proceedings in, not to be published, 233.
 reference to take proof of material facts stated in the complaint, 232.
 referee not to be named by the parties, 232.
 on ground of adultery, averments in, complaint for, 232.
 objections to legitimacy of children to be stated in complaint, 233.
 manner of settling the issues in, 218.
 examination of plaintiff as a witness, 233.
- DOCKET** of justice's judgment, 49.
 justice to enter pleadings in, 49.

- DOCKET OF JUDGMENT, entry on, of the words, "*secured on appeal*," 128.
on petition, in what cases, 220.
 DOCKETING JUDGMENT, on filing judgment-roll, 128.
of justice's court, 49, 52.
 DOCUMENTS. See *Admission, Discovery*.
 DOMICILE. See *Residence*.
 DOWER, tenant in, interest of, how calculated, 231.
costs in action for, 142.
admeasurement of, 37.
 DRUNKARD. See *Habitual drunkard*.
 DUE, answer admitting part of claim to be, 111.

E.

- EJECTMENT, place of trial of, 69.
by grantee of land held adversely, 65.
 ENDORSEMENT of papers, 207.
of papers on taking a default, 220.
 ENLARGING TIME to take proceedings, time to take any proceedings except
an appeal may be enlarged, 178, 202.
by order for discovery, &c., 209.
orders for, how granted, 210.
to make a case, 213.
See Time.
 ENTITLING affidavit 179.
 ENTRY, *or right of entry*, action after, 57.
of appearance, when allowed, 208.
of order, 156, 206.
of verdict, 120.
of judgment, manner of, 126.
after offer, 171.
fees for, 144.
on petition, 220.
in mortgage cases, 225.
in judgment-book, 123.
See Docketing judgment.
 ENUMERATED MOTIONS, what are, 216.
when to be noticed, 216.
papers to be furnished on, 217.
when motion may be made to strike from the calendar, 217.
 EQUITABLE remedies, distinction between, and legal abolished, 26.
 ERIE COUNTY, first subdivision of section 30 not to apply to, 38.
 ERROR, writ of, abolished, 193.
See Appeal.
 ERRORS and defects, when to be disregarded, 89.
See Amendments.
 ESCAPE, time of limitation in action for, 61.
 EVIDENCE of foreign laws, 184.
of foreign public records, 184.
provisions as to, applied to justices' courts, 51.
on the trial of an issue of fact by the court, how reviewed, 122, 123.
pleadings not to be, in criminal proceedings, 83.
examination in supplementary proceedings not to be, in criminal proceedings, 134.
of new or continuing contract to take case out of statute of limitations, 64.
See Admissions, Examination of parties, Examination of witnesses.

EXAMINATION of parties by adversary only in the cases prescribed by the Code, 173.

- may be on the trial, conditionally or on commission, 173.
 - before trial, 174.
 - in actions for divorce, 238.
 - attendance for purposes of, how compelled, 174.
 - punishment for refusing to submit to, 174.
 - testimony on, may be rebutted, 174.
 - on their own behalf, when, 174, 175.
 - of co-plaintiff or co-defendant, 175.
 - of joint contractors or parties united in interest, 175.
 - of witnesses*, witness not excluded by reason of interest, 175.
 - party for whose immediate benefit action is prosecuted or defended, 175.
 - assignor of cause of action, 176.
 - at circuit, mode of, 212.
 - witnesses and parties*, conditionally, by commission, 173, 174.
 - of applicants for admission to practice as attorneys, &c., 205.
 - in supplementary proceedings, 183, 184.
 - of parties or witnesses on a motion, 173.
- See Supplementary proceedings.*

EXCEPTIONS to a matter of law arising on the trial of an issue of fact by the court may, for the purpose of an appeal, be taken within ten days after written notice of the judgment, 122.

- to be reduced to writing or entered in the minutes of judge, 120.
- hearing of in first instance at general term, 121.
- not necessary to review in court of appeals a judgment on a verdict subject to the opinion of the court, 121.
- separating, 121.
- need not be signed, nor sealed, nor need a bill of exceptions be made, 121.
- how stated in a case, 120.
- form ~~and~~ what to contain, 120, 214.
- settlement of, 120, 218.
- filing, 214.
- when deemed waived, 214.
- to sureties on appeal to court of appeals, 153.
- on claim and delivery, 99.
- to bail, 94.
- to report of referee, 212.

EXCHANGE of causes on calendar, 202, 203. *See Change.***EXECUTION of course**, within five years, 129.

- by order*, after five years, 129.
 - kinds of, 180.
 - form of, 181.
 - to be deemed process, 180.
 - need not be sealed nor subscribed, except as prescribed, 180.
 - to what counties it may issue, 180.
 - may issue to several counties at the same time, 180, 181.
 - on judgments in existing suits, 184.
 - debtor of execution debtor may pay, 185.
 - leave to issue, how obtained, 129.
 - against the person*, 181.
 - against a married woman, 181.
 - return of*, in what time, 182.
 - how compelled, 182.
 - should be to the clerk with whom judgment-roll is filed, 182.
 - existing provisions of law*, applied to, 182.
 - on judgment of justices' court*, 50.
 - proceedings supplementary to, 183.
 - on confession of judgment without action, 171.
- See Supplementary proceedings.*

- EXECUTORS.** costs in actions by or against, 145.
cannot be sued in justices' courts, 47.
may sue without joining party in interest, 66.
may appeal without giving security, 152.
reference of claim against, 145.
- EXEMPTION LAW** retained by the Code, 198.
- EXISTING** *practice*, when it may be adopted, 196, 234.
rules abrogated, 196.
law, as to executions, continued, 132.
suits, appeals in, 194.
time of limitation in, not affected, 55.
no writ of error allowed in, 147.
execution on judgment in, 194.
application of Code to, 193.
issues of fact in county court in, 195.
provisions and rules relating to, 193.
- EX-PARTE ORDER**, how vacated or modified, 147.
may be entered, 156.
when may be made, 177.
proceedings stayed by, 177. See *Order*.
extending time to answer, 177, 178. See *Enlarging time*.
- EXTRAORDINARY terms**, governor may appoint, 34, 194.
cases, allowance in, 143.
- EXTRA ALLOWANCE.** See *Allowance*.
- F.**
- FACT**, questions of, not in issue on pleadings, how tried, 54, 124.
- FACTOR**, when liable to arrest, 91.
- FAILURE of proof**, what is, 87.
- FALSE imprisonment**, action for, cannot be brought in justices' courts, 46.
must be within two years, 61.
costs in action for, 140.
- FEE BILL** abolished, 139. See *Costs*.
- FEES**, judges of superior court, and New York common pleas, not to receive, 41.
of clerks, 144.
of referees, 125, 144.
when forfeited, 125.
to witnesses in supplementary proceedings, 138.
for copies of papers, 144.
of sheriff on attachment, 110.
to a justice for his return, 166.
of attorney and counsel, 136.
of commissioners in lunacy, 231.
- FEIGNED ISSUES** abolished, 54.
substitute for, 54.
See *Issues*.
- FEMALE**, when she cannot be arrested, 91.
See *Married Woman*.
- FERRIES**, jurisdiction of county court as to, 37.
- FICTITIOUS name**, party may be sued by, when real name unknown, 89.
- FIDUCIARY CAPACITY**, arrest for money received in, 91.
- FILING transcript of judgment**, effect of, as a lien, 123.
of justice's court, 49, 52.
complaint, 76.
summons and pleadings, 181.
notice of lis pendens, 73.
notes of issue, 216.
case, 213, 214.
undertakings, 183, 206.
on appeal to court of appeals, 153.
affidavits, 105, 206, 207.

FILING—(continued).

- papers, 206.
- copy in lieu of original, 188.
- orders as judgments in certain cases, 220.
- notice and affidavit, on claim and delivery, 101.
- order appointing receiver, 187.
- judgments, 207.

FINAL ORDER, appeal from, to court of appeals, 81.

FINDING OF FACTS not required at general term, 123.
controlled by general verdict, 120.

FINE, power of county court to remit, 37.

arrest in action for, 91.

See *Forfeiture, Penalty*.

FIRST JUDICIAL DISTRICT, proceedings commenced before one judge in,
may be continued before another, 85.

- motions in, 177, 178.
- rules of court in, 239.
- note of issue in, 116, 117.
- notice of trial in, 116.
- employment of stenographer on trials in, 116, 117, 118.
- hearing of appeals to general terms in, 154, 155.
- default on motion in, 219.
- special circuit calendar in, 239.
- short causes, 280.
- preferred causes in, 239.
- mortgage or sale of real estate by religious corporations in, 240.
- sales by order of the court in, 236, 240.
- trial fees at general term in, 240.
- substitution of attorney, order for, 240.
- discontinuance, order for, 240.
- special term at chambers, 241.
- motions at chambers, 241.
- admission of attorneys, 241.
- position on calendar of causes called and passed in, 238.

See *Common pleas, Superior court*.

FISHERIES, jurisdiction of county court as to, 87.

FOLIOS of case in court of appeals to be numbered and printed on margin, 200.
the like in supreme court, 219.

of pleadings, &c., to be marked, 210.

FORECLOSURE of mortgage, county court has jurisdiction of, 86.

- judgment on, 86.
- service of summons on unknown parties in action for, 76.
- place of trial of, 70.
- allowance in addition to costs in actions for, 142.
- notice of *lis pendens* in actions for, 73.
- staying sale on, 229.

See *Mortgage Cases*.

FOREIGN CORPORATION, *actions against*, in what court and by whom it
may be brought, 184.

service of summons on, 74.

by publication, 74, 75.

attachment against the property of, 104.

See *Corporation*.

FOREIGN laws, how proved, 184.

FORFEITED RECOGNIZANCES, power of county court to remit, 37.

See *Recognizances*.

FORFEITURE, action for, within what time to be commenced, 61.

against directors or stock-
holders of moneyed cor-
poration, 64.

FORFEITURE—(continued).

place of trial of action to recover, 70.
judgment of, against corporation, 189.
to people, actions for, 190.

FORM of action abolished, 58.

of pleading, abolished, 78.

FORMER PRACTICE, when it may be adopted, 196.

inconsistent with the Code, abrogated, 196.

FRANCHISE, action against persons claiming, 189.

penalty for usurping, 189.

FRAUD, certain actions for, may be in courts of justices of the peace, 43.

when right of action accrues in cases of, 51, 60.

time of limitation in actions for relief on the ground of, prescribed, 60.

arrest when defendant has been guilty of, 91.

FRIVOLOUS *demurrer, answer or reply*, party prejudiced by, may move for

judgment on, 114.

FUEL for courts, who to furnish, 82, 85, 86.

FULTON and Hamilton, when considered one county, 34.

FURNITURE for court, who to provide, 82, 85, 86.

FURTHER account, 83.

See *Account*.

return, to court of appeals, 199.

on appeal from justice's court, 162.

time, 178.

See *Enlarging time*.

G.

GENERAL denial, when and how made, 80, 81.

guardian, security to be given by, 222.

how appointed, 222.

not to receive property of infant until security given, 222.

proceedings on petition for, 223.

See *Guardian, Partition, Special guardian*.

and special term, number of counsel on hearing at, 220.

rules, judges to frame, 197.

term, appeal to, 122, 123.

terms of supreme court, number of, annually, 83.

judgment, how given at, 38.

extraordinary, 34, 194.

existing provisions of law as to, repealed, 83.

inability of judge to sit at, 85.

of the superior court, when held, 2.

what will be heard at, 2.

justice appointed to hold will attend at chambers, 237.

for hearing appeals from orders on non-enumerated motions, 237.

of New York common pleas, when to be held, 250.

calendar for, 241.

review of orders of single judge at, 242.

verdict, 119.

GOODS or chattels, action for taking, detaining, or injuring, within what time to be brought, 60.

See *Personal property*.

GOVERNOR to appoint terms, 84, 194.

GRANTEE OF THE PEOPLE, limitation of action by, 56.

of lands held adversely, action by, 65.

GUARDIAN for infant, when necessary, 66.

appointment of, 66, 221.

for married woman, not necessary, 66.

to continue in court of appeals, 199.

GUARDIAN—(continued).

- accountability of, 189.
- not to receive the property of an infant until he has given security to account, 222.
- ad litem*, officers of the courts to act as, 221.
 - liable for costs, 145.
 - duties and compensation of, 221, 222.
 - who not to be appointed, 221.
 - not to receive funds of infant until he has given security, 222.
- general*, how appointed, 222.
 - security by, 222.
 - payment of moneys to, 224.
- special*, how appointed, 222.
 - order appointing, 222.
 - security by, 224.

H.

- HABITUAL DRUNKARD**, county court has jurisdiction of, and of the estate of, 87.
 - other powers of county court, as to, 87.
 - service of summons on, 74.
- HAMILTON and Fulton**, when considered one county, 84.
- HEIRS** of deceased judgment debtor, proceedings against, 169.
 - See *Joint debtors, &c.*
- HUSBAND AND WIFE**, when they should join, or be joined, as parties, 66.
 - See *Divorce, Married Woman, Wife.*

I.

- IDIOT**, service of summons on, 74.
- IMMATERIAL**. See *Irrelevant*.
 - variance, 87.
- IMMEDIATE BENEFIT**, person for whose immediate benefit action is prosecuted or defended, may be a witness, 175.
- IMPRISONED DEBTORS**, jurisdiction of county court as to, 87.
- IMPRISONMENT** *for debt*, act as to, not affected by the Code, 90.
 - of defendant, effect of on time of limitation, 59, 68.
- INABILITY** of judge to hold a special term, circuit court, or sit at general term, or preside atoyer and termlier, provided for, 85, 178.
 - of mayor's or recorder's court, 40.
 - to hear motion, 178.
 - of county judge, to try case, 83.
 - of county court to hear appeal, 88.
- INCONSISTENT** statutory provisions repealed, 196.
 - rules and practice abrogated, 196.
- INDEFINITE and uncertain pleading** may be made more definite and certain by amendment, 84.
 - motion to correct, 220.
- INDEX** to case in court of appeals, when necessary, 200.
- INDIAN LANDS**, railroads through, county court has jurisdiction of, 87.
- INDORSEMENT** on papers of name and residence, 207, 220.
- INFANCY**, effect of on time of limitation, 59, 68.
- INFANT** plaintiff, costs against, 145.
 - service of summons on, 74.
 - guardian of, liable for costs, 145.
 - sale, mortgage, or other disposition of real estate of, county court may decree, 87.
 - specific performance by, county court may decree, 87.
 - to appear by guardian, 66.

INFANT—(continued).

- guardian for, how appointed, 66, 221, 222.
- age of, how ascertained, 222.
- amount of property of, how ascertained, 222.
- sale of real estate of, 223, 224.
- proceeds of sale of real estate of, to be brought into court, 224.
- costs on reference as to sale of real property of, 224.
- guardian of, to give security to account, 222.

See Guardian.

INFERIOR COURT, costs on review of a decision of, in a special proceeding, 145.

- appeal to county court and New York common pleas from, 157.
- appeal to supreme court from, 154.

INFORMATION *in nature of quo warranto* abolished, and action substituted, 185.**INJUNCTION**, writ of, abolished and order substituted, 107.

- may be by the court, or a judge, or a county judge, 101.
- to suspend business of corporation, 103.
- in what case granted, 101, 102.
- may be granted at any stage of the action before judgment, 102.
- how grounds for issuing may be shown to the court, 101, 102.
- after answer, 102.
- security upon, 102.

- to stay business of corporation, 103.

- affidavit on which obtained, to be filed, 206.

- reference to ascertain damage on, 102.

- defendant may be heard before granting of, 102.

- motion to vacate or modify, 103.

- stay by, effect of, on time of limitation, 64.

INJURY *to the person or character*, defendant may be arrested in action for, 91.

- to person or property, action for in justices' courts, 43.

INQUEST, intention to take, must be expressed in the notice of trial, 212.

- may be taken on the opening of the court, any day after the first day of the term, unless an affidavit of merits be filed, 212.

INQUIRY *of damages*. *See Assessment of damages.***INSANE PERSON**, service of summons on, 74.

- limitation of action against, 59, 63.

- See Unsound mind.*

INSOLVENT DEBTORS, jurisdiction of county court as to, 37.

- bond of assignee of, 249.

INSOLVENT surety, new undertaking may be ordered, 150, 151.**INSPECTION** of books, &c., 173, 208. *See Discovery.***INSTALLMENTS**, execution for, on judgment by confession, 171.

- in mortgage cases, allowances on, 143.

- action for, on bond, 43.

INSTRUMENT *in writing*, parties to actions upon, 63.

- costs, where several actions on one instrument, 140.

- for payment of money, action or defence on, how pleaded, 84.

- in justices' courts, 50.

- allowance in addition to costs, in action for construction of, 142.

- See Sealed instrument.*

INTEREST, on verdict or report of referee, when allowed, 143.

- not to disqualify a witness, 175.

- party in, to sue, 65.

- all parties in, to be joined, 67, 68.

- when all parties in, need not be joined, 68.

- transfer of, not to abate action, 63.

INTERLOCUTORY costs, how adjusted, 143, 144.

- within what time to be paid, 221.

INTERMEDIATE ORDER, when may be reviewed on appeal, 30, 143.**INTERPLEADER**, when it will be ordered, 69.**INTERROGATORIES**, costs for drawing, 141.

- INTRUSION** into office, action for, 186, 187.
- IRREGULARITY**, notice of motion for, to specify irregularity complained of, 216.
- IRRELEVANT** answers and defenses may be stricken out, 81.
or redundant matter may be struck out on motion, 84.
 motion to strike out as, when and how made, 220.
- ISSUES**, different kinds of, 114.
fetigned, abolished, 54.
 when they arise, 114.
 when issues of fact arise, 115.
 when issues of law arise, 114.
 of law and fact may arise in one action, 115.
 when there are issues of law and fact, the issues of law to be first tried, unless court otherwise order, 115.
 the judicial examination of is a trial, 115.
 how tried, 115, 212, 213.
 may be referred, 123.
of law to be tried by the court, unless they are referred, 115.
of fact in action for the recovery of money only, or specific real or personal property, or for a divorce, to be tried by a jury, unless jury trial is waived, or a reference be ordered, 115.
in other actions, to be tried by the court, except a jury trial or a reference be ordered, 115.
of fact triable by the court may be tried at circuit or special term, 115, 116, 212.
 of fact triable by a jury or by the court, to be tried before a single judge, 115.
 of fact in the supreme court, to be tried at a circuit when the trial is by jury, otherwise at circuit or special term, 115, 116.
 how settled, 213.
of law to be tried at a circuit or special term, 116.
of law to have preference on the calendar, unless the court otherwise direct, 116.
 of law proceedings in judgment on, 123.
 decision on, what to contain, 123.
 where tried, 115, 116.
 either party may notice for trial, 116.
 note of, to be furnished to clerk, 116.
 note of, in first district, 116.
 to be entered on calendar, 116.
 how disposed of on the calendar, 116.
 of fact joined in a county court before July, 1843, 195.
 date of, on appeal, 216.
 when either party may bring to trial, 116.
 in divorce cases, 213.
 See *Note of issue, Trial, Verdict.*
- ITEMS OF ACCOUNT**, when need not to be inserted in pleading, 83.
 how to be delivered, 83.
 further particulars of, 83, 84.

J.

- JOINDER** of causes of action, 85, 86.
 of defenses, 81.
 of parties, 68. See *Parties.*
 joinder of parties, where some refuse to join, 68.
 where parties very numerous, 68.
- JOINT** and *several defendants*, proceedings against, where the summons is served on one or some of the defendants only, 76.
 where the summons is served on all the defendants, 76, 77.
 judgments in actions against, 126.
- contractor*, examination of, as a witness on his own behalf, 175.

JOINT—(continued).

- debtors, heirs, devisees, legatees, and tenants holding under a deceased judgment debtor*, proceedings against, 168, 169.
- on judgment against one of several joint debtors, those not served may be summoned to show cause why they should not be bound by the judgment, 168.
- if judgment debtor die after judgment, his heirs, devisees, or legatees, or the tenants of real property owned by him, and affected by the judgment, may be summoned to show cause why judgment should not be enforced out of estate of deceased, 169.
- form of summons, 169.
- summons to be accompanied by affidavit of amount due, 169.
- answer by party summoned, 169.
- subsequent proceedings the same as in an action, 169.
- answer and reply to be verified as in an action, 170.
- attachment may issue to compel application of property to payment of the judgment, 169, 170.
- costs in proceedings against, 142.
- JUDGE**, *order of*, when enforced in same manner as an order of the court, 101.
- inability of, to hold a special term, circuit court, or sit at a general term, or preside at oyer and terminer, provided for, 35.
- at chambers*, business before, 35.
- county judge has power of, in actions in the supreme court, 178.
- of court of appeals* may adjourn court, 32.
- orders by, 202.
- may enlarge time for taking any proceedings, 202.
- of supreme court* to transact business out of court, 35.
- business commenced before one judge in first judicial district, may be continued before another, 35, 178.
- to appoint times and places for holding courts, 34.
- inability of, 35.
- of superior court*, to take no fees for services, 40, 41.
- of New York common pleas*, review of orders of, 248.
- of county court*, powers of, 177, 178, 179. See *County Judge*.

JUDGES to meet and revise rules, 197.
not to act as referees, 125.

JUDGMENT defined, 112.

- on failure of defendant to answer*, 79, 80, 112, 216.
- where to be applied for, 211.
- after service by publication, 113, 211.
- for the difference on an admitted demand and admitted counterclaim, 113.
- after amendment of complaint, 79, 80.
- clerk to enter pursuant to verdict, 120.
- manner of entering, 126, 207.
- clerk to insert costs in entry of, 113, 144.
- clerk's fee for entering, 144.
- in action to recover personal property, 127.
- how directed, 127.
- on the pleadings, motion for, 32.
- against joint or several defendants, 76, 126.
- for want of reply to answer, 32.
- on frivolous demurrer, answer, or reply, 114.
- to be entered in judgment-book, 128.
- when and how docketed, 49, 52, 128.
- entry on docket of, "secured on appeal," 123, 129.
- on report of referee*, 124, 125.
- on issue of law, proceedings on, 123.
- on bond and warrant, &c., executed before July, 1848, 168.
- by confession, 43, 170, 171.

JUDGMENT—(continued).

- of court of appeals, 82.
- of supreme court, general term, 83.
- of superior court, how pronounced, 41.
- of New York common pleas, how pronounced, 41.
- of justice of the peace, power of county court over, 87.
 - transcript of, 49, 52.
 - docketing, 49, 52.
- how pleaded, 84.
- orders on petition may be enrolled or docketed as, 220.
- appeal from, to general term, 155.
 - to court of appeals, 149.
 - judgment at general term on verdict subject to opinion of the court, 121.
- on appeal, 148, 149.
- in foreclosure cases, 225, 226.
- in divorce cases, 216.
- taken against a party through his mistake, inadvertence or surprise, or excusable neglect, court may relieve from, 88.
- how enforced*, 180.
- when a lien on real estate, 49, 52, 128.
- restitution on reversal of, 76, 149, 164.
- reversed*, time for commencing action after, 68.
- will not be reversed for technical defects, 89.
- actions on, regulated, 54.
- actions on, in justices' courts, 43.
- time for commencing action on, 60.
- of court of special jurisdiction, how pleaded, 84.
- book*, clerk to keep, 127.
- debtor*, debts due may be paid to sheriff, 135.
- proceedings against, after execution returned unsatisfied, 138.
- See *Supplementary proceedings*.
- roll*, when clerk to make up, 123.
 - of what constituted, 123.
 - on submission of controversy without action, 168.
 - on confession of judgment without action, 48, 107.
 - on appeals to court of appeals, 82, 201, 204, 215, 216.
 - on appeal to common pleas, or county court, 164.
 - statement of facts to be annexed to, 215.
 - on submitting a controversy without action, 168.
 - on confession of judgment without action, 171.
 - in actions for usurping office, 188.
 - for divorce, &c., 233.

JURISDICTION of courts generally, 80.

- answer or demurrer of want of, 79, 80.
- courts acquire, from time of service of summons, or allowance of provisional remedy, 77.
- of justices' courts of cities, 52.
- courts continued, except as altered, 80.
- court of appeals, 80.
- county court, 86.
- superior court, New York, 89.
- common pleas, New York, 89.
- mayors' and recorders' courts, 89.
- of justices of the peace, 43.

JURY. See *Trial by jury*.

- verdict of, 119, 120. See *Verdict*.
- trial, how waived, 122.
- in county court and court of sessions, how drawn and summoned, 88.
- for adjourned circuit and county court and oyer and terminer, 85.

JUSTICE. See *Courts of justice. Judge.*

- JUSTICES' COURTS** *of New York City*, 51.
of cities, jurisdiction of, 52.
 general provisions as to, 52.
 transcript of judgment of, 49, 52.
 appeals from, to common pleas, 157 to 167.
 when judgment of deemed judgment of N. Y.
 common pleas, 52.
 supplementary proceedings on judgment of, 183.
- JUSTICES of the peace**, *courts of*, existing provisions of law as to, abolished, 42.
 jurisdiction of, 43.
 rules in, 49.
 pleadings in, 49, 50, 51.
 answer of title in, 47.
 variance, 50.
 amendments, 50.
 execution, 50.
 to furnish transcript of judgment, 49.
 certain provision of the Code applied to, 51.
 offer of defendant in, 51.
 judgment by confession in, 43.
 fees to, for return on appeal, 166.
 how to make a return, 161, 220.
 appeal to court of appeals in actions commenced before,
 81.
judgment of, how reviewed, 31, 36, 157.
 transcript of, may be filed and docketed
 with county clerk, 49.
 effect of filing such transcript, 49.
 when a lien on real estate, 49, 12.
 powers of county court as to, 37.
- JUSTICES of superior court**, New York, number of, 41.
- JUSTIFICATION** of slander, how pleaded, 85.
 of bail, 95, 206. See *Bail*.
 of sureties on appeal, 153.
 of sureties on claim and delivery, 99, 100.
 of sureties in all cases, 206.

K.

KINGS COUNTY, first subdivision of section 30 of the Code not to apply to, 83.

L.

- LANDLORD and tenant**, effect of relation of, on time for commencing action to
 recover real property, 53.
- LANDS**. See *Indian lands*, *State lands*, *Rent property*.
- LAWs** of other States and governments, how proved, 184.
 inconsistent with Code repealed, 196.
- LEGAL NOTICES**, time for publication of, how computed, 183.
- LEGITIMACY of children**, how questioned in actions for divorce, 233.
- LETTERS PATENT**, action to vacate, 187.
- LIABILITY created by statute**, within what time to be sued upon, 60.
 time for bringing suit upon, 60.
- LIBEL**, *actions for*, cannot be brought in justices' courts, 46.
 must be brought within two years, 61.
 how stated in complaint, 85.
 answer in action for, 85.
 costs, 140.

- LIEN** by judgment on real estate, 49, 52, 128.
by attachment on real estate, 78.
of justices' judgment, 49, 52.
- LIFE INTEREST**, how computed, 231, 235, 236.
- LIFE TENANT**. See *Tenant for life. Dower.*
- LIGHTS** for courts, supervisors to furnish, 82, 85.
- LIMITATIONS**, defence of, must be set up in answer, 55.
revival of debt barred by, 64.
of actions, repeal of existing limitations, 54.
when action deemed commenced, 62.
effect of absence from State on, 62.
See *Times for commencing actions.*
- LIQUIDATE DAMAGES**, defendant may offer to, 172.
- LIS PENDENS**, notice of, when may be filed, 73.
what to contain, 73.
in foreclosure suits, 73.
when constructive notice, 73.
when it may be removed, 73.
- LOST PAPER**, &c., place of, how supplied, 188.
- LUNACY**. See *Commission of lunacy.*
- LUNATIC**, county court has jurisdiction of the person and estate of, 37.
committee of, payment of costs by, 231.

M.

- MAIL**, service of papers by, 180.
time of service by, 180.
- MALICIOUS PROSECUTION**, action for, cannot be brought in justices' courts, 46.
costs in actions for, 140.
- MANAGING AGENT** of a corporation, service of summons on, 74.
- MANDAMUS**, proceedings on, not affected by the second part of the Code, 197.
amendment of, 197.
on return to, rule to plead may be entered, 220.
- MARINE COURT** of New York City, 51.
judgment of, may be reviewed in New York common pleas, 157, 158.
appeal to court of appeals in actions commenced in, 31.
- MARRIAGE** not to abate action, 68.
action to declare void, 232. See *Divorce.*
- MARRIED WOMAN**, parties to action by and against, 66.
costs against, 126.
need not prosecute or defend by guardian or next friend, 66.
judgment against, 126.
execution against, 131.
time for commencing action against, 59, 68.
- MATERIAL ALLEGATION**, if not denied, deemed admitted, 86.
- MAYOR'S COURT**, proceedings in, may be transferred to county court, 40.
jurisdiction of, 39, 40.
appeal from, to supreme court, 154.
- MERGE** of right to prosecute criminally, civil action is not, 27.
- MERITS**, affidavit of, when necessary, 210.
order involving, appeal from, 156.
- MINOR**, service of summons on, 74. See *Infant.*
- MINUTES**, special verdict or finding to be entered on, 120.
verdict to be entered on, 120.
motion for new trial founded on, 121.
entry on, of filing mortgage with the clerk, 227.
- MISNOMER**. See *Fictitious name.*
- MISTAKE**, the court may at any time order an amendment by correcting a mistake in the name of a party, or a mistake in any other respect, 68.

MISTAKE—(continued).

court may relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, 88.

See *Amendment, Variance*.

MITIGATING CIRCUMSTANCES, pleading, in action for libel or slander, 85.

MODIFYING order made out of court without notice, 147, 202.

MONEYED CORPORATIONS, time of limitation not applicable to actions in certain evidences of debt of, 64.
time of limitation against stockholders and directors of, in certain cases, 64.

MONEYS, order for payment of, 224, 230.

of *infantia*, when to be paid to guardian, 224.

brought into court, to whom paid, 229.

account of, how kept, 229.

of unknown owners, proceedings on claim of, 229, 236.

MORTGAGE. See *Foreclosure, Satisfaction*.

foreclosure of, judgment on, 86.

cases, court need not be furnished with copy pleadings in, when plaintiff's right not contested, 216.

reference to report amount due on, 225.

referee to be named by the court, 226.

absent defendants and infants in, 225.

application for judgment in, to be at special term, 225.

proof of filing notice of *lis pendens* in, 225.

judgment for sale in, 226.

surplus on sale of, to be deposited, 226.

how surplus moneys obtained out of court, 227.

mortgage must be recorded before deed executed, 227.

clerk to enter in minutes the filing the mortgage, 227.

sheriff to sell in parcels, unless otherwise ordered by the court, 227.

notice of sale, how to be published, 226.

staying sale, 224.

MOTION defined, 177.

affidavits on, to be filed, 206.

papers to be filed, 206, 207.

to be indorsed with title of action, 210.

renewal of, 210.

in court of appeals, 202.

in first judicial district, 177, 178, 219, 220.

within what district to be made, 177, 178.

preference of certain, 177.

to stay proceedings, 177.

notice of, 178.

transfer of, 178.

in superior court, 245.

how noticed, and defaults thereon, 215, 216.

enumerated, 216.

to be noticed for first day of term, 216.

papers to be furnished upon, and by whom, 216, 217.

non-enumerated, 216.

to vacate order of arrest, or reduce amount of bail, 97.

for discovery, 208.

points on, 219.

to strike out irrelevant or redundant matter, or to make pleading definite and certain, when to be noticed, 220.

contested, where to be heard, 216.

for new trial, 121, 164.

for judgment at general term, 121.

for allowance, where to be made, 220.

questions of fact arising on, may be referred, 124, 178.

MOTION—(continued).

in court of appeals, 202.
costs on, allowed in discretion of court, 145.
 at chambers, first district, 241.

N.

NAME to be indorsed on papers, 207.

Religious, when party may be sued by, 89.

NEGLECT, excusable, court may relieve from judgment taken through, 88, 89.

NEW MATTER must be pleaded, 80.

NEW PROMISE, to take case out of limitation, must be in writing, &c., 64, 65.

NEW TRIAL, motion for, 120, 121.

where to be heard, 121.

of specific questions of fact, or of questions of fact, not put in issue, 218.

on appeal from judgment, 147, 148.

county court, 153.

to county court or New York common pleas, 163.

before justice, after appeal, 163.

before appellate court, 163, 164.

county court may grant, 87.

costs on order for, 141, 142.

may be allowed on appeal from a judgment in a justice's court, 153.

appeals to court of appeals from orders granting or refusing, 80.

to general term from orders granting or refusing, 120.

in divorce cases, 218.

NEW YORK CITY, common pleas and superior court of, 89.

term of court of appeals in, 81.

justice's courts in, 51.

maritime court in, 51.

See *First judicial district. Charter. District court.*

NEW YORK COMMON PLEAS. See *Common pleas*.

appeals to, 157.

NEXT FRIEND for married woman, not necessary, 66.

NON-ENUMERATED MOTIONS, what are, and where to be heard, 216.

hearing of, 219.

See *Motions*.

NON-JOINDER of parties, 79. See *Parties*.

NON-RESIDENT debtor, jurisdiction of county court as to, 87.

service of summons on, by publication, 75.

attachment against, 104.

arrest of, 91.

service of papers on, 181.

NONSUIT, plaintiff may submit to, or may be nonsuited on trial before referees, 212.

has no right to submit to, after the jury have retired to consider their verdict, 212.

for not complying with order for discovery, 209.

See *Dismissal of complaint*.

NOTE OF ISSUE, party giving notice of trial, to furnish, 116.

requisites of, and when to be furnished, 116.

in first district, 116.

in superior court, 245.

duty of clerk on receipt of, 116.

payment on filing, 116.

for general term, 216.

notice of argument in place of, in court of appeals, 200.

NOTES. See *Bills and notes*.

NOTICE to be in writing, 179.
 in summons, 72.
 of application for judgment, 79.
service of,
 personal, or as prescribed, 175.
 by mail, 180.
 when not required, 181.
 on party out of the State, 181.
 to bring party into contempt, 181.
 where party appears by attorney, 181.
of motion generally, length of, 178.
 when necessary, 215.
 of motion for judgment for want of a reply or demurrer, 81.
 of enumerated motion, 216.
 of contested motion, 216.
 of appearance or retainer, to be deemed an appearance, 208.
of trial, 116, 181.
 at adjourned circuit, county court, or oyer and terminer, 85.
 before referee, 124.
 should state intention to take inquest, 212.
 either party giving, may bring issue to trial, 116.
 of adjusting costs, 143.
 of no personal claim, 72.
 See Personal claim.
 of *lis pendens*, 72.
 See Lis pendens.
 when it may be removed, 73.
of appeal, 148, 159.
 See Appeal.
 legal, publication of, 183.
 of claim of surplus money, 227.

NUISANCE writ of, abolished, and action substituted, 192.

NULLITY of marriage not to be declared by default, 253.

NUMBERING causes of action or grounds of defence, 269.

O.

OATH, referees may administer, 182.
 examination in supplementary proceedings to be on, 185.
OBJECT of action, notice of, 72.
OBLIGATION, time of limitation of action on, 60.
OCCUPANTS of State Lands, removal of, within jurisdiction of county court.
OCCUPATION, when deemed to be under legal title, 51.
 under written instrument, 57.
OFFER of defendant to compromise the whole or part of the action, defense may be before trial or verdict offer to allow judgment for a certain sum and costs, 51, 171.
 acceptance of offer, 171.
 when offer deemed withdrawn, 171.
 effect of offer if plaintiff do not recover a more favorable judgment, 171.
 to liquidate the damages, 172.
 effect of such offer, 172.
 effect of acceptance or refusal of such offer, 172.
 in justices' court, 51.
 of respondent, to allow justice's judgment to be corrected, 165.
OFFICE, action for usurping, 186.
OFFICER of corporation or banking association, when liable to arrest, 91.
 of court to act as guardian, 221.

- OFFICER of court**—(continued).
 to require sureties to justify, 206.
 how compelled to return process, 207.
 of special jurisdiction, determination of, how pleaded, 84.
- OMISSION**, court may supply, 87.
 See *Mistake*.
- OPINIONS** in court below to be printed in case on appeal to court of appeals, 200.
- ORAL EXAMINATION** on motion, 173.
- ORDER**, definition of, 177.
 review of, on appeal from judgment, 80, 148.
 appeal from, 147, 156.
 how and where made, 177.
 time for complying with, 220.
 in superior court 245.
 in court of appeals, 202.
 made out of court, how vacated or modified, 147.
 entry of, 206.
 staying proceedings, 178.
 copy affidavit to be served with, 179.
 by county judge or county court, review of, 154, 178.
 must be entered, before appealed from, 156.
 ex parte, review of, in common pleas, 248.
 on petition, to refer to petition, 220.
 on petition, may be enrolled or docketed, 220.
 on banks for payment of money, 230.
 appointing guardian, 221.
 to show cause, 179, 215.
 appeal from, 80, 147, 154, 156.
 in superior court, 243, 244.
 in common pleas, 248.
 for publication, 75.
 to be filed, 206.
 arrest, 90.
 to extend time to answer or demur, how obtained, 210.
 affidavits on which granted to be filed, 206.
 See *Conditional order*, *Final order*, *Intermediate order*.
- OVER AND TERMINER**, existing provisions of law as to terms of, repealed, 83.
 extraordinary, 84.
 may be adjourned by entry on the minutes, 85.
 juries may be drawn for adjourned court, 85.
 causes may be noticed for trial at adjourned court, 85.
 inability of judge to preside at, 85.
 rooms for holding, 85.
 to be held with circuit, 84.

P.

- PAPERS**, service of, how made, 180.
 by mail, 180.
 when not required to be served on defendant, 181.
 on party out of the State, 181.
 where party appears by attorney, to be on the attorney, 181.
 to bring party into contempt, 181.
 lost or withheld, how place of supplied, 181.
 to be filed, 181, 206.
 transfer of, on change of place of trial, 71, 206.
 attorney to indorse his name and residence on, 207.
 to be furnished the court, on motions, 216.
 on trial, 119.
 to be printed in court of appeals, 200.
 on appeal to general term, 217.

PAPERS—(continued).

- to be served, to be indorsed with name, &c., of attorney, 207.
- on motion, to be indorsed with title of action, 208.
- on submission of controversy without action, 217.
- omitting to furnish, effect of, 119, 200
- to be furnished on appeal to the court of appeals, 201.
- to be marked by folios, and legibly written, 209.

PAROL AGREEMENT as to proceedings in a cause, 206.

PART of claim, order to satisfy, 111.

PARTIAL DEFENCE. See *Mitigating circumstances*, 84.

PARTICULARS, bill of, 68.

PARTIES TO ACTIONS, provisions as to, applied to justices' courts, 51.

- how designated, 53.
- provisions as to, 65.
- party in interest to sue, 65.
- by grantee of land held adversely, 65.
- by assignees, 65.
- by administrators, 66.
- by executors, 66.
- by trustees of express trusts, 66.
- by parties authorized by statute to sue, 66.
- on bills and notes, &c., 68.
- by and against married woman, 66.
- plaintiff, 67.
- defendant, 67.
- by and against infants, 66.
- who to be joined as, 67.
- on bills and notes, 67.
- death of *pendente lite*, 67.
- marriage of, *pendente lite*, 67.
- transfer of interest of, 67.
- court may determine controversy between, 67.
- when they may interplead, 67, 68.
- demurrer for defect of, 79.
- when others may be ordered to be brought in, 69.
- examination of, as witnesses, 178.
- defect of, how taken advantage of, 79.
- service of notices and papers on, 179, 180.

See *Party*.

PARTIES TO APPEAL, how designated, 148.

PARTITION, provisions of revised statutes apply to actions for, 191.

- jurisdiction of county court in, 37.
- rules as to separate actions for, 223.
- costs and allowances in actions for, 142, 228.
- no copies of pleadings need be furnished court in actions for, where plaintiff's right not contested, 216.
- reference as to title, 228.
- reference as to sale, 228.
- staying sale, 229.

PARTY, attendance of, in supplementary proceedings, 184.

attendance as a witness, how compelled, 184, 175.

in interest, action to be in name of, 65.

prosecuting or defending in person to endorse process and papers, 205.

See *Parties to action*.

PATENT, action to vacate, 187.

PAYMENT, examination of plaintiff as to, 118.

of part, effect of, on time of limitation, 65.

PENAL ACTION, time of limitation in, 60, 61.

PENALTY, justices of the peace have jurisdiction of action for, not exceeding two hundred dollars, 48.

action for, within what time to be commenced, 60, 61.

against stockholders or directors of moneyed corporations, 64.

where to be tried, 70.

PENALTY—(continued).

arrest in action for, 91.

PENDING SUITS, what not affected, 86, 194.

See *Action, pending*.

PEOPLE, when they will not sue for real property, 55.

they or their grantees to sue within twenty years in certain cases, 56.

time of limitation applies to actions by, 61.

when they cannot sue or be sued in justices' courts, 46.

injunction at instance of, to suspend business of corporations, 108.

costs in actions by, or in name of, 146.

actions in name of, 185, 186.

actions for forfeiture of property to, 190.

may move cause out of its order, on court of appeals' calendar, 201.

PERCENTAGE, in addition to costs, 142, 148. See *Allowance*.**PERFORMANCE** of conditions precedent, how pleaded, 84.

specific, county court may order, 87.

may be enforced by execution, 190.

PERISHABLE PROPERTY, proceedings on attachment of, 106.

may be sold notwithstanding an appeal, 153.

PERPETUATING TESTIMONY, costs attending, to take deposition on, 141.**PERSON**, injuries to, cause of action for, may be joined with cause of action for injury to property, 86.

of unsound mind, sale, mortgage or other disposition of real estate of, county court may decree, 87.

care and custody of the person and estate of, may be decreed by county court, 87.

service of summons on, 74.

execution against, 181.

PERSONAL CLAIM, notices that none is made, when it may be served, 72.

what to contain, 72.

effect of defending after, 72.

service of copy complaint after, 72.

PERSONAL PROPERTY defined, 195.

time for commencing action for taking, detaining or injuring, or for recovery of possession of, 60.

arrest in action to recover, 91.

judgment in action to recover, 127.

costs in actions to recover the possession of, 140.

distrained, action for recovery of, where to be tried, 70.

doing damage, answer, 83.

execution against, 181, 182.

See *Claim and delivery of personal property*.

PERSONAL SERVICE of summons, voluntary appearance equivalent to, 77.

See *Service*.

PETITION for discovery, what to contain, 203, 209.

orders granted on, to refer to, 220.

order or judgment on, may be enrolled or docketed, 220.

on appeal from surrogate, 217, 218.

for appointment of guardian, 222, 228.

for admeasurement of dower, 87.

PHYSICIANS, jurisdiction of county court as to, 87.**PLACE** of abode. See *Residence*.

of business of attorney to be endorsed on process or papers, 207, 208.

of trial of actions, to recover real property, or any estate or interest in real property, or to determine right or interest to real property, 70.

for injuries to real property, 70.

for partition of real property, 70.

to foreclose a mortgage of real property, 70.

to recover personal property distrained for any cause, 70.

to recover a penalty or forfeiture imposed by statute, 70.

PLACE of trial of actions—(continued).

against a public officer or his deputy, 70.
 in other actions where parties reside, 70.
 of issues of fact to be tried by the court, 115, 212.
 may be changed, 70.
 in what cases it may be changed, 71.
 effect of change of, 71, 2. 6.
 affidavit to change, 221.

PLAINTIFF, the party complaining is, 53.

who should be joined as, 65, 67, 68.
 relief to, 127.
 an infant, costs against, 145.
 nonsuit of, before referees, 212.
 pleading on part of, 78.
 when no right to submit to non-suit, 212.
 need not be called when jury render their verdict, 212.
 in person must endorse name and place of business on papers and
 process, 208.
 when to furnish the court with copy pleadings, &c., 119.
 may stipulate to proceed to trial, 211.
 judgment against one of several, 126.
 when to give security before taking judgment, 114, 211.
 death of, pending the action, 68.
 must prove his case in justices' courts, 50.

See *Parties to action, Separation.*

PLEADINGS in courts of record, forms of, abolished, 78.

sufficiency of, to be determined by the rules prescribed by the
 Code, 78.
 lost or withheld, place of, how supplied, 183.
 the complaint, 78. See *complaint.*
 the demurrer, 79. See *demurrer.*
 the answer, 80. See *Answer.*
 the reply, 81. See *Reply.*
 general rules of, 82.
 mistakes and amendments, 87. See *Amendments.*
 to be subscribed, 82.
 to be verified, except demurrers, 83.
 how verified, 83.
 when verification may be omitted, 83.
 when agent or attorney may make the verification, 83.
 writing, numbering folios and endorsing, 210.
 how an account is to be stated in, 83.
 copy account to be furnished, 83.
 further account may be ordered, 83.
 bill of particulars, court may order to be furnished, 84.
 to be liberally construed, 84.
 irrelevant or redundant matter to be struck out of, 84.
 indefinite or uncertain pleading may be ordered to be made
 more definite and certain, 84.
 judgments and determinations, how pleaded, 84.
 denial that judgment or determination was duly given, effect of,
 84.
 conditions precedent, how pleaded, 84.
 in action or defence founded on instrument for the payment of
 money, 84.
 private statutes or rights derived therefrom, how pleaded, 85.
 libel and slander, how stated in complaint, 85.
 answer in actions for libel and slander, 85.
 in actions to recover property distrained, doing damage, 85.
 what causes of action may be joined, 85, 86.
 allegations not denied when deemed true, 86.
 new matter in answer (not a counter-claim) is to be deemed
 controverted as upon a direct denial or avoidance, 86.

- PLEADINGS** *in courts of record*—(continued).
 the like of new matter in a reply, 86.
 cannot be used as evidence in criminal proceedings, 83.
 to be legibly written, 210.
 folios of, to be marked, 210.
 each cause of action or defence to be separately numbered, 209.
 discovery to enable party to prepare, 208.
mistakes in, and amendments, 87. See *Amendment, Mistake, Variance*.
 party may be sued by a fictitious name, 89.
 errors and defects not affecting substantial rights, to be disregarded, 89.
 supplemental pleading, when allowed, 89.
 when amended, to be answered anew, 79.
 court to be furnished with copy of, 119.
 to be filed, 181.
 striking out, for parties refusing to attend as a witness, 174.
 copies of, not to be given out in divorce cases, 288.
 admissions in, 86.
 motion for judgment on, 82.
in justices' courts, 49.
 See *Amended Pleading. Answer of Title. Answer. Complaint. Demurrer. Reply. Supplemental Pleading.*
- POINTS** *in supreme court* to be printed, 217.
 to be furnished, 217.
 facts deemed established to be stated on, 217.
in court of appeals, to be printed, 200.
 statement of facts on, 201.
 copies for the court and adverse party, 201.
 on motion, 219.
- POSSESSION** *of land*, when presumed, 57.
 by tenant deemed possession by landlord, 59.
of personal property, action to recover arrest in, 91.
 costs in action to recover, 140.
 See *Adverse possession.*
- POSTPONEMENT**, costs on, 144. See *Adjournment.*
- PRACTICE**, all inconsistent with the Code, repealed, 196.
 in cases not provided for, 196, 284.
- PRAYER** for relief, 78.
- PREFERENCE** of motions and appeals relating to provisional remedies, 177.
 of cause on court of appeals calendar, 201, 208.
 of causes in first district, 243.
 of motions at chambers in first district, 241.
- PRELIMINARY INJUNCTION**, 101, 102. See *Injunction.*
- PRESUMPTION** of possession, 57.
- PRIVATE STATUTES**, how pleaded, 85.
- PROCEEDINGS**, stay of, by orders for discovery, 209.
 stipulations as to, to be in writing, 208.
 stay of, within ten days of trial, 215.
- PROCESS** out of justices' courts, provisions of Code as to service on corporations.
 applied to, 51.
 execution to be deemed, 180.
 attorney to endorse name and address on, 207.
 duty of sheriff and coroner as to, 182.
 return of how compelled, 207. See *Summons.*
- PRODUCTION** and *discovery of books, papers, &c.*, 172.
 application for, in what cases, 172.
 petition for, what to state, 208.
 order for, what to specify, 209.
 operates as a stay of proceedings, 209.
 See *Admission, Inspection, Discovery.*
- PROHIBITION**
 not affected by the second part of the Code, 197.
 on filing return to, rule to plead may be entered, 226.

PROMISSORY NOTES. See *Bills and notes*.

PROOF of service of summons, 77, 209.

of service of amended complaint, &c., 80.

failure of, 87.

of notice, when counsel to endorse his name on, 220.

of laws of other States, &c., 184.

of public records of other States, 184.

of filing notice of *lis pendens*, 225.

of citizenship, &c., by applicant for admission as an attorney, 205.

PROPERTY, the word defined, 196.

causes of action for injuries to, and to the person, may be joined in one complaint, 86.

distraint doing damage, answer in action for, 85.

arrest in action for taking or detaining, 91.

execution against, 181, 182.

exempt from execution, 182.

ordered to be applied to execution, 186.

when to vest in receiver, 137.

See *Personal property, Real property*.

PROVISIONAL REMEDIES, 90.

appeals to general term from order granting or refusing, 156.

motion to vacate or modify, 177.

See *Arrest, Attachment, Claim and delivery, Injunction, Receivers, Remedies*.

PUBLIC OFFICER, actions against, where to be tried, 70.

when liable to arrest, 91.

rights of, as to place of trial, 70.

See *Officer*.

records of foreign State, how proved, 148.

PUBLICATION of appointment of terms of supreme court, &c., 85.

of terms of county courts, 88.

of legal notices, time for, 183.

of notice of motion for leave to issue execution, 129, 180.

of advertisement, how proved, 77.

of proceedings in divorce cases prohibited, 233.

service of summons by, in what cases, 74, 75, 76.

order for, 75.

personal service out of State, 75.

when defendant allowed to defend after, 75.

complaint must be first filed, 76.

when service complete after, 77.

proof of, 77.

application for judgment after, 113, 211.

affidavits on which order for obtained, to be filed, 206.

order for, to be filed, 206.

Q.

QUESTION of fact, arising on motion or otherwise, references to ascertain, 124, 54.

trial of, by court or jury. See *Trial*.

appeal on, 155. See *Appeal*.

court will not hear extended discussion on, 201, 219.

not in issue on the pleadings, how tried, 54, 124.

review of, on appeal, 122, 123.

of law, review of, on appeal, 122, 123.

when trial involves, verdict may be ordered subject to the opinion of the court, 121.

of practice, review of, in New York common pleas, 248.

QUO WARRANTO, writ of, proceedings by information in the nature of, abolished, and action substituted, 185.

R.

RAILROAD, through Indian lands, county court has jurisdiction of, 87.

RATE OF DAMAGES, what recoverable, 127.

REAL ESTATE, when a justice's judgment is a lien on, and may be enforced against, 49, 52.

judgment lien on, 128.

proceeds of, belonging to infants, how disposed of, 224.

See *Real property*.

REAL NAME, when not known, party may be sued by fictitious, 89.

REAL party in interest. See *Party in interest*.

REAL PROPERTY, definition of, 159.

general provisions relating to actions concerning, 55.

title to, sold under judgment, afterwards set aside, 76.

costs in actions to recover, 139, 140.

when title to, in question, 43.

lien on, by attachment, 78.

lien on, by judgment, 49, 52, 128.

adjudged to be sold, where to be sold, 139, 226, 240.

actions to determine conflicting claims to, 191.

general provisions as to actions relating to, 193.

time for commencing actions for trespass on, 60.

for the recovery of, 55.

entry on, 57.

partition of, 191, 223.

adverse possession of, what is, 57, 58.

notice of *lis pendens* in actions affecting, 78.

place of trial of actions relating to, 70.

See *Conflicting claims, Ejectment, Partition, Infant, Real estate, Religious corporation, Habitual drunkard, Lunatic, Person of unsound mind*.

REBUTTING TESTIMONY of party called as a witness, 174.

RECEIVER, in what case he may be appointed, 110, 111.

costs in actions by and against, 145.

costs to, 233, 234.

commissions to, 111.

may sell doubtful claims, &c., 234, 108.

not to sell real estate without an order, 234.

in *supplementary proceedings*, when may be appointed, 136.

order appointing, to be filed, 137.

subject to order of the court, 137.

only one to be appointed, 186.

RECOGNIZANCES, costs where actions on, 140.

See *Forfeited recognizances*.

RECORD of foreign State, how proved, 134.

See *Judgment-roll*.

RECORDEE'S COURT, jurisdiction of, 89.

removal of proceedings from, 39.

appeal from, to supreme court, 154.

RECOUPMENT, See *Counter-claim*.

RECOVERY set-off of, 165.

REDUCING amount of bill, 97.

REDUNDANT, 84. See *Irrelevant and redundant*.

REFEREE, when not to be nominated by the parties, 232.

how chosen, 125.

mode of trial by, 124.

to take affidavit or deposition for purposes of a motion, 178.

powers of, 124, 182.

fees of, 125, 144, 178.

report of, 124, 125, 212.

REFEREE—(continued).

- within what time to report, 125.
- report has effect of special verdict, 124.
- interest on report of, 143.
- judgment on report of, 124.
- appeal to general term from judgment on report of, 124, 125.
- appeal to court of appeals from judgment on report of, 124, 125.
- in proceeding supplementary to execution, 138, 249.
- judge not to act as, 125.

REFERENCE by consent, 123.

- by compulsion, 124.
- when ordered, 125.
- of issues, 123.
- to take an account, 124.
- of questions arising on motion, &c., 124, 178.
- on judgment for want of answer, 111.
- where to be executed, 211.
- in proceedings supplementary to execution, 138.
- in foreclosure cases, 235.
- of claim against deceased person, 145.
- in actions for divorce, 232.
- partition, 232.
- to ascertain damages on injunction*, 102.
- when action to proceed as if none ordered, 125.
- of other than the issues, proceedings on, 212.

REHEARING, in court of appeals, when to be had, 32.

See New trial.

RELIEF, demand of, 78.

- in cases of mistake, &c., 88.
- when there is no answer, extent of, 127.
- where to be applied for, 211.
- judgment taken by mistake, &c., 88, 89.
- to plaintiff, 127.
- to defendant, 119, 120, 126.
- time of limitation in action for certain, 61.

See Affirmative relief.

RELIGIOUS CORPORATION, county court may decree mortgage or sale of real property of, 37.

- application of, to mortgage or sell its real estate in the first district, want to state, 240.

REMEDIES, division of, 26.

- civil and criminal not merged, 27.

See Provisional remedies.

REMITTITUR from court of appeals, 31, 202.

- clerk to sign, &c., 202.

REMOVAL of occupants from State lands within the jurisdiction of the county court, 37.

- of notice of lis pendens, 78.
- of actions* from county court to supreme court, 36.
- superior court and common pleas, N. Y., to supreme court, 39.

See Transfer of causes.

RENEWAL OF MOTIONS, special motions cannot be renewed without leave, 210.**REPEAL** of inconsistent laws, 106.**REPLY**, when to be put in, and what to contain, 81, 82.

- demurrer to 82.
- motion for judgment for want of, 82.
- when court may order a reply, 82.
- discovery to enable plaintiff to prepare, 203.
- supplemental, when may be put in, 89.
- new matter in, deemed controverted, 86.
- frivolous, judgment on, 114. *See Frivolous demurrer.*

- REPORTS OF CASES** adjudged in foreign States, books of, presumptive evidence of the law in such States, 184.
of referees, what to state, 124, 212.
of referees, exceptions to, 212.
- RESIDENCE** of attorney to be endorsed on papers and pleadings to be served, 207.
- RESIDENT DEFENDANT**, when he may be served with summons by publication, 75.
- RESPONDENT**, who is, 148.
may offer to have judgment corrected, 165.
- RESTITUTION** on reversal of judgment, 76, 149, 165.
after judgment, for want of an answer, 114.
- RETAINER**, notice of, an appearance, 208.
- RETURN** of process, &c., how compelled, 267.
of summons, sheriff to make, 74.
of justice, 161, 162.
of justice, fee for, 166.
of clerk to court of appeals, 148.
- REVERSAL** of judgment, costs on, 164.
not allowed for errors or defects not affecting the merits, 89.
by default, 204.
time for commencing action after, 68.
of justices' judgment, 162, 163, 164.
restitution on, 76, 149, 165.
- REVIEW** of questions of law and fact arising on a trial of a question of fact by the court, how obtained, 122, 123.
of order of county judge, 178.
of judgments rendered prior to July, 1848, 198.
of orders on questions of practice in N. Y. common pleas, 248.
See *Appeal*.
- REVISED STATUTES**, certain parts of, not repealed, 197.
- REVOKING** order of judge of court of appeals, 202.
- RIGHT OF ENTRY**, action after accrual of, 57.
- ROAD**. See *Turnpike roads, Railroads*.
- ROLL**, attorneys to sign, 206.
See *Judgment-roll*.
- ROOMS**, supervisors to provide, 85.
for court of appeals, 82.
- RULES**, all inconsistent with Code, repealed, 196.
judges to meet to revise and make new, 197.
of court of appeals, 199.
of supreme court, of superior court, of New York common pleas, and county courts, 205.
of supreme court, first district, 239.
of superior court, New York, 242. See *Superior court*.
of New York common pleas, 247.
in justices' court, 49.
of evidence. See *Evidence*.
of pleading. See *Pleading*.
of construction, 196.
- S.
- SALE** of mortgaged premises, county court may order, 87.
of real property of infant or person of unsound mind, county court may order, 87.
of real property of religious corporations, county court may order, 87.
of infant, rules regulating, 223, 224.
adjudged to be sold, 226, 227, 131.
of evidences of debt taken on attachment, 103.
of perishable property, 106, 153.

SALE—(continued).

of vessels, 106.

by receiver, 234.

by sheriff, of evidences of debt seized under an attachment, 168.

SATISFACTION *of execution*, when debtor to judgment debtor may make, 135.

what property may be ordered to be applied to, 135.

of part of claim admitted to be due, 111, 112.

of mortgage, county court has jurisdiction of, 26.

SCIRE FACIAS, writ of, abolished and action substituted, 185.

SEALED INSTRUMENT, time for commencing action on, 60.

SECRETARY *of State* to publish appointment of terms, 35.

SECURED ON APPEAL, entry of, on docket, 128.

SECURITY *for costs* may be required of a plaintiff who is an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue, 145.

on arrest plaintiff to give, 92.

on attachment, plaintiff to give, 105.

by defendant, on return of property to him, 109.

on claim and delivery, by plaintiff, 93.

by defendant, 99.

on injunction, where no special provision on the subject, 102.

to suspend business of corporation, 103.

on appeal to court of appeals, 150, 151, 152, 153.

to supreme court from inferior court, 155.

from special to general term, 156.

orders, 156.

justices' courts, 159.

on taking a judgment for want of an answer, 112, 113, 211.

by guardian, 223, 224.

value of, to be proved, 207.

SEDUCTION, action for, cannot be brought in justices' courts, 46.

costs in actions for, 140.

SEISIN, when necessary in action or defence founded on title, 56.

SEPARATE defences, 81, 209.

judgment, when may be rendered, 126.

trial, when court may order, 119.

SEPARATION, action for, reference to take proof of material facts in complaint, 242.

plaintiff may be examined in, 233.

SERVICE *of summons*, by whom, 73.

on whom, 74.

time of service, 73.

how made, 74.

by publication, 74, 75.

on unknown defendant, 76.

on corporation, 74.

on a minor, 74.

on a person of unsound mind, 74.

out of the state, 75.

on joint and several defendants, 76.

time for, may be fixed, 74.

when complete, 77.

proof of, 77, 209.

gives jurisdiction, 77.

voluntary appearance equivalent to, 77.

is commencement of action, 62.

of order of arrest, 92.

time to answer after, 92.

on corporations, provisions as to, applied to justices' courts, 51.

of complaint, with summons, 72.

with notice of no personal claim, 72.

after demand, 72.

of notices and other papers, on party or attorney, 150, 151.

- SERVICE** of notices—(continued).
how made, 180.
by mail, 180, 181.
on a party residing out of the State, 181.
on attorney for the party, 181.
sections 408 to 418 not to apply to service of summons, or process, or paper to bring a party into contempt, 181.
- SET-OFF**, assignor of right of action takes subject to, 65.
of cos's and recovery on appeal to New York common pleas, 165, 166.
See *Counter-claim*.
- SETTLEMENT**, costs on a, 142, 146.
of issues, 213.
of case, 121, 123, 213, 214.
of exceptions and special verdict, 213.
- SEVERAL** actions on one instrument, 68.
attachments may issue at the same time, 105.
execution, 181.
causes of action may be united in one complaint 85.
to be separately stated and numbered, 209.
counter-claims may be set up, 81. See *Counter-claim*.
to be separately stated and numbered, 209.
debtors. See *Joint and several debtors*.
defences may be set up, 81.
to be separately stated and numbered, 81, 209.
each to be plainly numbered, 209.
replies to be separately stated and numbered, 209.
defendants, service of summons on, 76.
cost to, 140, 141.
attachment of property of, 109.
judgment against, 126.
See *Joint and several defendants*.
plaintiffs, judgment against one of, 126.
- SEVERANCE** of action on allowance of demurrer, 88.
- SHAM** answers and defences may be stricken out on motion, 81.
See *Frivolous*.
- SHAREHOLDER**. See *Stockholder*.
- SHERIFF** may serve summons, 73.
when a party, coroner to perform the duties of, 182.
action against, to be within three years, 60.
for escape, to be within one year, 61.
may sue in his own name, 103.
to return summons, 74.
proof of service of summons by, 77.
return of process, &c., by, how compelled, 207.
to provide rooms, &c., 82, 84, 86.
may be ordered to take property, &c., and deposit it in court, 111.
duties of, &c., incident to arrest:
to execute order by arresting defendant, 93.
to deliver copy order of arrest and affidavit to defendant, 92, 93.
to accept bail or deposit, 93.
to detain defendant at instance of bail, 93, 94.
to deliver order, with return endorsed, and certified copy undertaking of bail, to plaintiff, 94.
may give notice of justification of bail, 95.
when exonerated from liability, 95.
to give defendant a certificate of deposit, 96.
to pay deposit into court, 96.
when liable as bail, 96.
proceedings on judgment against, as bail, 97.
liability of bail to, 97.
to file affidavits on which arrest is made, 206.
duties of, incident to attachment:
to proceed on, as in case of attachment against absent debtors, 106.

SHERIFF, duties of, &c., incident to attachment—(continued).

- to make an inventory, 106.
- inventory to be signed and returned, 106.
- to take legal proceedings to recover debts, credits, &c., of the defendant, 106.
- to sell perishable property, 106.
- to sell vessels, 106.
- as to property incapable of manual delivery, 106.
- to satisfy judgment out of property attached, 107, 108.
- as to release of attached property after satisfaction of judgment, 108.
- may apply to court for leave to sell evidences of debt, 108.
- may permit actions to be in name of plaintiff, 108.
- on judgment for the defendant, 109.
- on discharge of the attachment, 109.
- to return warrant and proceedings thereon, 110.
- fees of, 110.
- duties, &c., incident to claim and delivery of personal property:*
 - to take property, 98.
 - to deliver to the defendant a copy of the affidavit, notice, and undertaking, 98.
 - responsible for plaintiff's sureties, 99.
 - when to deliver property to the plaintiff, 99.
 - when to deliver property to the defendant, 99.
 - when responsible for defendant's sureties, 98, 100.
 - proceedings by, where the property is concealed in building or enclosure, 100.
 - to keep property in a secure place, 100.
 - when property claimed by third party, 100.
 - to file notice and affidavit, with proceedings thereon, 101.
- duty of, &c., incident to execution:*
 - to return execution, 132.
 - former laws apply to, 132.
 - how compelled to return process, 207.
 - duties of, in serving and executing process, 132.
 - to sell and convey real property adjudged to be sold, 226.

SHIPS. See *Vessels*.

- SHORT CAUSES** in supreme court, first district, 239.
- in N. Y. superior court, 245.
- in N. Y. common pleas, 248.

SLANDER, actions for, cannot be brought in courts of justices of the peace, must be brought within two years, 61.

- complaint* in action for, 85.
- answer in,* 85.
- costs in, 140.

SPECIAL circuit calendar, in first district, 239.

- finding,* when court may direct, 119, 120.
- guardian,* application to appoint, 222.
- security by, 224.
- jurisdiction,* judgment of court or officer of, how pleaded, 84.
- motion,* papers used on, to be filed, 200.
- proceedings* defined, 26.
- appeal from final order in, to court of appeals, 31.
- costs of reviewing the decision of an inferior court in, 140.
- term,* adjournment of to chambers, 85.
- terms,* and general terms of *supreme court,* existing provisions law as to, repealed, 33.
- prescribed, 33, 34.
- extraordinary, 34.
- inability of judge to hold, 35.
- appeal from orders at, 156.
- verdict,* 119. See *Verdict*.
- to be filed, 120.
- referee's report to have effect of, 124.

- SPECIAL verdict**—(continued).
 settlement of, 214.
- SPECIFIC PERFORMANCE**, county court may decree, 27.
 by execution, 180.
- SPECIFIC RECOVERY of personal property**, limitation of actions for, 60.
- STATE**, when action cannot be brought by the grantee of the, 56.
 effect of absence from, on time of limitation, 62.
 lands, removal of occupants from, within jurisdiction of county court, 27.
- STATEMENT of facts**, on appeal to court of appeals, 218.
- STATIONERY** for courts, how supplied, 22, 25, 26.
- STATUTE**, rule of strict construction of, not to apply to Code, 196.
 action upon, for penalty or forfeiture, 60, 61.
 private, how pleaded, 85.
 of limitation, 54. See *Times for commencing actions*.
- STATUTORY liability**, limitation for action on, 60, 61.
 provisions, all inconsistent with Code, repealed, 196.
 certain, not affected by the second part of the Code, 197, 198.
- STAY of execution**, by appeal to court of appeals, 150, 153.
 from inferior court to supreme court, 154.
 to general term, 156.
 from justice's court, 167.
 of proceedings, order for, for more than twenty days, cannot be granted, except on notice, 177.
 order for discovery to operate as, unless, &c., 209.
 how ordered within ten days of the trial, 215.
 stay of sale in partition or foreclosure cases, 229.
 county judge cannot order after verdict, 177.
 effect of on time of limitation, 64.
 court of appeals, or judge thereof, may make order for, 202.
- STENOGRAPHER** to be appointed in supreme, superior and court of common pleas, 116.
 his compensation, 116.
 his duties, 116.
 at court of oyer and terminer, 117.
 charges of, may be taxed as costs, 117.
 in other counties than N. Y., 118.
- STIPULATION** to try at next circuit, 211.
 as to proceedings to be in writing or entered on minutes, 208.
- STOCKHOLDER** in moneyed corporations, limitation of certain actions against, 64.
- STRIKING out pleading** for party refusing to be examined as a witness, 174.
 irrelevant answers or defenses, 81.
 irrelevant or redundant matter, 84.
 cause from calendar in court of appeals, 208.
 supreme court, 217.
- SUBMITTING cause on printed arguments** in court of appeals, 202, 204.
- SUBMITTING CONTROVERSY without action**, 167.
 who to furnish papers on arguments of, 217.
 judgment as in other cases, but without certain costs, 163.
 judgment-roll, how constituted, 168.
 judgment may be enforced or appealed as in an action, 164.
- SUBSCRIPTION** of summons, 71.
 of pleadings, 82.
- SUBSEQUENT application for order, when first refused**, 210.
 for time to answer or demur, 210.
- SUBSTITUTED SERVICE of process**. See *Publication*.
- SUBSTITUTION** of attorney, 208, 247.
- SUBSTITUTING a party**, in cases of transfer of interest *pendente lite*, 63.
 when ordered in case of two or more claimants of one subject-matter, 69.

SUIT. See *Action*.

SUMMING UP, at circuit, one counsel only allowed to, and time for, 212.

SUMMONS, actions to be commenced by service of, 71.

form of, ordinarily, 71.

when served without copy complaint, 72.

by publication, 74, 75.

notice to be inserted in, 72.

service of, by whom it may be served, 73.

how it must be served, 72.

on corporation, 74, 51.

on minor under age of fourteen, 74.

on person judicially declared to be of unsound mind, &c., 74.

in other cases, 74.

on unknown defendant in foreclosure action, 76.

personal service, 74.

party subscribing may fix time for service, 74.

by publication, when ordered, and how made, 74, 75, 76.

on joint and several defendants, 76.

when complete, 74.

proof of service of, 77, 209.

effect of service to confer jurisdiction, 77.

voluntary appearance is equivalent to personal service of, 77.

to be filed, 181.

in proceedings against heirs, &c., of deceased judgment debtors, 169.

SUNDAY, when excluded in the computation of time, 179.

SUPERIOR COURT, of *Buffalo*, appeal to, 153.

appeal from, 30.

of the *city of New York*, jurisdiction of, 89.

jurisdiction of transferred suits, 42.

transfer of causes from, to supreme court, 89.

transfer of causes to, from supreme court, 42.

inquest in, 245.

terms of, 41.

special terms of, how held, 41.

judges of, to receive no fees, 41.

judgment of, where given, and how pronounced, 41.

crier to be appointed, 41.

to consist of six justices, 41.

section 28 of Code to apply to, 42.

rules of general and special terms, when held, 242.

business at general term, time of opening, 242.

trial terms, time of opening, 242.

special terms, 242.

non-enumerated motions, where heard; default in,

where to be taken, 242, 243.

attendance of judges at chambers, 243.

appeals from orders on non-enumerated motions, 243.

motion to set aside verdict as against evidence, and

entry of judgment without prejudice, 243.

case and exceptions on motions to set aside verdict as

against evidence, 243.

hearing on motion to set aside verdict, 244.

appeal from order granting or refusing a new trial, 244.

costs on appeal, 244.

motion for re-hearing before referee, 244.

note of issue, 244, 245.

inquests, 245.

filing papers, entering order, motion for judgment, 245.

false defences, short causes, 245.

regulations of calendar, 246.

SUPERVISORS to provide rooms, &c., 35.

- SUPPLEMENTAL** *pleading*, when allowed, 89.
complaint, action may be continued by, 68.
- SUPPLEMENTARY** *proceedings*, provisions as to, 183
 when an order for the examination of the judgment debtor may be applied for, 183.
 when county judge incapacitated from acting, 184.
 arrest of defendant upon, 184.
 examination upon order, 184.
against debtor of judgment debtor or of those having property belonging to him, 185.
 witnesses, how required to appear and testify, 186.
 examinations to be on oath, 186.
 what property may be ordered to be applied to execution, 186.
 appointment of receiver, 186.
 prohibiting transfer of property, 187.
 where a third party claims property alleged to be the property of the judgment debtor, 187.
 where the alleged debtor to judgment debtor denies his indebtedness, 187.
 reference may be ordered, 188.
 costs of proceedings and fees to witnesses, 188.
 disobeying order, 188.
 referees in New York common pleas, 249.
- SUPREME COURT**, jurisdiction of, 33.
general terms, 33.
special terms, 34.
 rooms, attendants, fuel, &c., to be provided for, 85.
 transfer to, of actions from superior court and New York common pleas, 39.
 transfer to, of actions from county courts, 86, 88.
 transfer of actions from, to superior court, 41.
 rules of, 205.
 judges to frame rules, 197.
 judges. *See Judge*.
 former rules of, abrogated, 196.
- SURETIES** to justify in all cases, 206
qualification and justification of, on arrest, 95.
 on claim of delivery, 100.
 becoming insolvent, new undertaking may be ordered, 150.
 bonds, &c., of, to be approved and acknowledged, 206, 207.
See Bail, Security.
- SURETY BONDS**, *actions on*, justice of the peace has jurisdiction of, 48.
See Bonds, Undertakings.
- SURPLUS** moneys, how disposed of, 226, 227.
- SURROGATE**, appeals from, not affected by the second part of the Code, 197.
 examination of parties and witnesses before, 176.
 appeals from, regulated, 217, 197.
 costs on, 197.

T.

- TAKING** personal property, action for, within what time to be brought, 60.
- TAXATION** of costs, 143, 144.
- TECHNICAL DEFECT**, court will not reverse judgment for, 89.
- TEMPORARY INJUNCTION**. *See Injunction*.
- TENANT** holding under a deceased judgment debtor, 169.
 possession of, when deemed possession of landlord, 58.
See Joint debtors, &c.

TENANT FOR LIFE, interest of, how calculated, 281.

TENDER. See *Offer*.

TERMS, on a postponement, 144.

of court of appeals, 81.

of supreme court, circuit courts, and courts of oyer and terminer, 83, 84, 85, 250.

extraordinary, 84, 194.

appointment of, to be transmitted to secretary of state, and published, 85.

inability of judge to hold, 85.

of superior court, 242, 266.

of New York common pleas, 247, 269.

of county courts, 88.

costs of, 142.

TESTIMONY of parties, 178.

of witnesses, 176.

THE PEOPLE. See *People*.

THING IN ACTION, what may be assigned, 65.

action by assignee of, 65.

TIME to serve complaint after demand, 72.

to answer or demur, 72, 79.

to answer or demur to amend complaint, 79.

to answer after service of order of arrest, 92.

to answer or demur not to be extended without an affidavit of merits, 210.

to answer or demur subsequent extension of, 210.

to reply, 81.

within which to amend of course, 87.

to file note of issue, 116.

for service of notices, &c., 180, 181.

for service of order of arrest, 92, 93.

for notice of trial, 116, 180, 45.

for appeal, 149, 158, 179. See *Appeal*.

to return execution, 181.

enlarging, 178, 202, 210.

to sum up at circuit, 212.

to argue cause in court of appeals, 203.

to argue cause at special or general term, 220.

to comply with conditional order, 226.

to make a case, 213, 214.

to turn case into special verdict or exceptions, 214.

to serve amendments to case or exceptions, 214.

how computed, 179.

if 1st day be Sunday, 179.

on notice of trial, 180.

for publication of legal notices, 188.

to take proceedings, except appeal, may be enlarged, 178.

double, when service by mail, 180.

TIMES for commencing actions, provisions as to, applied to justices' courts, 80.

in general, 84.

objection that action not commenced in time must be taken by answer, 55.

for the recovery of real property, 55.

other than to recover real property, 59.

general provisions as to, 62.

TITLE of affidavit, 179.

of action not changed on appeal, 148.

of action to be indorsed on motion papers, 210.

need not be set forth in answer to action to recover property distrained *damage feasant*, 85.

to real property, justices of the peace have no jurisdiction of actions involving, 46.

answer of title in justices' courts, 47.

certificate that it came in question, 48.

TITLE—(continued).

costs when it comes in question, 48.

to property sold on execution, 76.

TRANSCRIPT *of judgment* may be filed, 128.

effect of filing as a lien, 128.

of justice's judgment, 49.

TRANSFER of proceedings from one judge to another, 35, 178.

of causes from supreme to superior court, 39.

from superior to supreme court, 40.

from mayor's or recorder's court, 40.

from county court to supreme court, 38.

from justice's court to supreme court, on answer of title, 47, 48.

of property, judge may order judgment debtor to give undertaking not to make, 184.

when may be forbidden, 187.

of hearing motion or order to show cause, 178.*of interest not to abate action*, 68.*of papers on file* on change of place of trial, 71.See *Assignment*.TRANSITORY ACTIONS. See *Local and transitory actions*.TRESPASS *on real property*, time for commencing action for, 60.

TRIAL, definition of, 115.

of question of fact not in issue on pleadings, 54, 124.place of, 69. See *Place of trial*.

mode of, 114.

either party giving notice may bring on, and in the absence of adverse party take a dismissal of the complaint or a verdict or judgment, 118, 119.

separate, between the plaintiff and one or some of the defendants, may be had, 119.

copy summons and pleadings to court on, 112.

amendments at, 87.

costs on postponement of, 144.

of issue of law, cost on, 141.*of issue of fact*, cost on, 141.

where new trial ordered, 142.

number of counsel heard on, 212.

notice of, either party may give, 116.

length of, 116, 180.

in New York common pleas, 247.

in first judicial district, 116.

stipulation to proceed to, 21.

court to be furnished with copy pleadings, etc., 119.

examination of witnesses, 212.

stenographer to take evidence on, 117, 118.

dismissal of complaint for not proceeding to, 126, 211.

by jury, 118, 119.

how waived, 122.

motion for, in certain cases, 218.

by the court, of a question of fact, decision to be given in writing, and be filed with the clerk within twenty days, 122.*judgment on decision*, how entered, 122.*finding of judge on*, what to contain, 122.*for the purpose of an appeal*, either party may except to a decision on a matter of law arising on, 122.*a review of the evidence appearing on*, how obtained, 122, 123.*questions of law*, how and when reviewed, 122, 123.*questions of fact*, how and when reviewed, 122, 123.*by referee*, 123.

fee, at general term in first district, 240.

See *Notice of trial, Postponement of trial, New trial, Verdict*.TROVER. See *Personal property*.

- TRUST COMPANY, accounts of deposits with, 230.
orders to draw moneys from, 230.
- TRUSTEE may be sued in action for claims arising on contract and by operation of law, 86.
plaintiff may be required to give security for costs, 145.
when personally liable for costs, 145.
security on appeal by, 152.
of an express trust, may sue without joining party in interest, 66.
who is a trustee of an express trust, 66.
costs in an action by or against, 145.
- TRUTH, defence of, in action for libel or slander, 85.
- TWENPIKE ROADS, jurisdiction of county courts as to, 87.

U.

- UNCERTAIN, 84. See *Indefinite and uncertain*.
- UNDERTAKING, on answer of title in justices' courts, 47.
to be proved or acknowledged, 207.
on appeal, to be filed, 153, 153, 216.
on appeal, when not to be sued, 155.
to be delivered to parties, 153.
on obtaining order of arrest, 92.
on obtaining warrant of attachment, 105.
now, when may be ordered, 150, 151.
in all cases to be filed, 206.
See *Security*.
- UNKNOWN DEFENDANT in foreclosures, how served with summons, 76.
- UNKNOWN OWNERS, moneys of, 236.
in partition, 228.
- UN SOUND MIND. See *Persons of unsound mind*.
- USURPING office or franchise, action for, 187.

V.

- VACATING order of arrest, 92, 97.
order made out of court, 147.
attachment, 109.
injunction, 108.
provisional remedy, motion for, to have preference, 177.
charter of corporation, action for, 185, 186.
- VARIANCE not to be deemed material unless it has misled the adverse party, 87.
immaterial, amendment of, 87.
in justices' courts, 50.
See *Amendment, Mistake*.
- VENUE. See *Place of trial*.
affidavits to change, 221.
- VERDICT, general and special, defined, 119.
what verdict jury may render, 119, 120.
special, controls general, 120.
assessing defendant's damages, 120.
subject to the opinion of the court, 121.
entry of, 120.
entry of judgment on, 120,
special, how settled, 213.
to be filed, 120.
referees' report to have effect of, 124.
calling plaintiff before delivery of, 212.
interest on, when allowed, 143.
judge may entertain motion to set aside, 121.
subject to opinion of the court, 121.
death of party after, 68.

- VERIFICATION** of *pleadings*, when necessary, 88.
 how to be made, 88.
 when it may be omitted, 88.
 by the attorney or agent, 88.
 when corporation is a party, 88.
- VESSELS**, sale of, on attachment, 106.
- VOLUNTARY APPEARANCE** equivalent to personal service of summons, 77.
 See *Appearance*.

W.

- WAIVER** of appeal to the court of appeals, by not serving copies of case, 200.
 by not filing return, 199.
 of defence, 80.
 of trial by jury, 122.
 of objection that papers not folioed, &c., 210.
 of case, 214.
- WARRANT** of attorney, given before July, 1848, judgment on, 188.
 of attachment, 106. See *Attachment*.
 for arrest of judgment debtor, 184.
- WASTE**, action of, abolished, and action under the code substituted, 192.
- WIFE**. See *Husband and wife, Married woman*.
- WILL**, action for construction of, allowance in addition to costs, 142.
- WITHHELD papers**, how supplied, 188.
- WITNESS**, *how compelled to attend*, on trial by referees, 124.
 on supplementary proceedings, 185, 186.
 allowance to, in proceedings supplementary to the execution, 189.
 punishment of, for disobedience to orders of judge or referee, 188.
 change of place of trial for convenience of, 71.
 parties to action may be, 178.
 interest not to disqualify, 175.
 power of referee to compel attendance of, 124.
 examination of adversary as, 178.
 compelling parties to attend as, 174.
 co-plaintiff or co-defendant may be examined as, 175.
 examination of, conditionally, costs on, 141.
 on motion, 178.
 in supplementary proceedings, 185, 186.
 in surrogates' courts, 176.
 on trial at the circuit, 212.
 in special proceedings, 176.
 assignor of thing in action may be, 176.
 in divorce cases, 288.
- WRECK**s, jurisdiction of county court as to, 87.
- WRIT** of injunction, abolished, 101.
 of nuisance, abolished, 192.
 of error in civil actions, abolished, 147.
 of inquiry of damages, 82. See *Assessment of damages*.
 of inquiry, on application for judgment on failure to answer, where to be executed, 241.
- WRITING**, admission or inspection of, 172.
 stipulation as to proceedings in an action to be in, 203.
 See *Admission, Discovery or inspection*.
- WRITTEN INSTRUMENT**, pleadings in action on, 50, 84.
 costs in action for construction of, 142.

Peculiarities of Capital
 in the United States
 and
 the Influence of
 the
 American People
 on the
 World as a Whole







5 JAN 23 1919



